

# EXHIBITS

DAILY COPY

1

1 UNITED STATES DISTRICT COURT  
 2 NORTHERN DISTRICT OF MISSISSIPPI

3 UNITED STATES OF AMERICA . Cause No. 3:07CR192  
 4 Plaintiff . Oxford, Mississippi  
 5 v. . July 2, 2008  
 6 . 9:51 a.m.

7 DAVID ZACHARY SCRUGGS .  
 8 Defendant .  
 9 . . . . .

10 SENTENCING AS TO COUNT 1 OF THE INFORMATION  
 11 BEFORE THE HONORABLE NEAL B. BIGGERS  
 12 U.S. SENIOR DISTRICT JUDGE

13 APPEARANCES:

14 For the Government: United States Attorney's Office  
 15 Northern District of Mississippi  
 16 BY: THOMAS W. DAWSON, ESQ.  
 17 BY: ROBERT H. NORMAN, ESQ.  
 18 900 Jefferson Avenue  
 19 Oxford, Mississippi 38655-3608

20 For the Defendant: TODD P. GRAVES, ESQ.  
 21 NATHAN GARRETT, ESQ.  
 22 Graves, Bartle & Marcus, LLC  
 23 1100 Main Street  
 24 Suite 2600  
 25 Kansas City, Missouri 64105  
 816-256-3173  
 MICHAEL C. MOORE, ESQ.  
 Michael Moore Law Firm, LLC  
 10 Canebrake Boulevard, Suite 150  
 Post Office Box 321048  
 Flowood, Mississippi 39232

Court Reporter: Rita Davis Sisk  
 911 Jackson Avenue, Room 369  
 Oxford, Mississippi 38865  
 (662) 261-3077

Proceedings recorded by mechanical stenography, transcript  
 produced by computer.

DAILY COPY

2

1           **THE COURT:** All right. The next case on the docket  
2 is *U.S. v. David Zachary Scruggs*. Who's with him? Are they  
3 here? (Pause) Come up, gentlemen. All right. Let's get some  
4 order back there. All right. In this case -- it's Docket No.  
5 CR192, *U.S. v. David Zachary Scruggs*.

6           Mr. Graves, are you ready to proceed on that?

7           **MR. GRAVES:** We are, Your Honor.

8           **THE COURT:** All right. And who's going to be  
9 representing -- Mr. Dawson, you're representing the Government?

10          **MR. DAWSON:** Yes, sir. We are.

11          **THE COURT:** All right. Let your client come up,  
12 Mr. Graves.

13          (Parties complying.)

14          **THE COURT:** Mr. Scruggs, on a previous day, you  
15 entered a plea of guilty to the crime of misprision of a  
16 felony. You're up before the Court now for sentencing. Is  
17 there anything you wish to -- before we get into that, I want  
18 to look at the sentencing guidelines in this case.

19          Mr. Graves, I got your memorandum yesterday that you sent  
20 in. And you are aware of the guidelines that were set in the  
21 underlying offense at the previous hearing of the Court. You  
22 have filed some comments on those -- some objections to those  
23 guidelines that were set then. Do you want to stand by -- I  
24 read your objections, read the response from the Government.  
25 Do you want to stand by the record as it stands now before the

1 Court, or do you wish to make any comments on any of those  
2 objections?

3 MR. GRAVES: Your Honor, I'm sorry, there was nothing  
4 new that we hadn't argued before in our memorandum. We'll  
5 stand on the pleadings as filed.

6 THE COURT: All right. Does the Government agree to  
7 do that also?

8 MR. DAWSON: Yes, sir. We had thought about, late  
9 yesterday afternoon, filing a response. We discussed it with  
10 counsel, and they assured us that there was nothing new in  
11 their memorandum that they had not already presented to the  
12 probation service. And in view of that representation -- and,  
13 quite frankly, some technical problems with our ECF -- we  
14 decided not to file but just to respond as the Court would  
15 indicate.

16 THE COURT: Very well. All right. Then, looking at  
17 the guidelines as computed by the probation office, the Court  
18 finds in this case that the basic offense level is 12, the  
19 specific offense characteristics are 18, bottom four points;  
20 but they're adjusted down because of the statute to 19 because  
21 in misprision of a felony the offense level can be no more than  
22 19. So the Court finds that is the base offense level.

23 To give the defendant credit for adjustment of  
24 responsibility, deducts 3 points; so the total offense level in  
25 this case is 16. And the defendant has a criminal history

DAILY COPY

4

1 category of one. So that will be the guidelines in the case.  
2 And that calls for a -- with a total offense level of 16 and a  
3 criminal history category of one, the guideline range of  
4 imprisonment is 21 to 27 months and a fine of 5,000 to 50,000.

5 All right. Now, Mr. Graves, is there anything you wish  
6 to -- well, I'll ask you first, Mr. Scruggs, is there anything  
7 you wish to state prior to sentencing?

8 THE DEFENDANT: Yes, sir, Your Honor.

9 THE COURT: All right.

10 THE DEFENDANT: I am deeply sorry and regretful for  
11 my involvement in this case. I wish that I could go back and  
12 change what happened a year ago. And I should have stopped  
13 what happened, and I should have objected to what happened; and  
14 I didn't do that. And that's why I'm here today. And I -- for  
15 that, I'm deeply sorry and remorseful. And I ask this Court's  
16 forgiveness. And my challenge now is to try to rebuild my  
17 life, Your Honor. Thank you.

18 THE COURT: All right. Mr. Graves?

19 MR. GRAVES: Just two short sentences, Your Honor.  
20 The defendant spent a great deal of time discussing this, the  
21 tragedy that this is for him personally, of his own making. He  
22 understands -- he's ashamed beyond what I think he can even  
23 express to the Court, and I think -- I would ask the Court to  
24 take into consideration that the main individual in this case  
25 was this defendant's father and his mentor. And I think that

DAILY COPY

5

1 that should be something that the Court considers as it thinks  
2 about the sentence.

3 THE COURT: I usually only hear from one attorney.  
4 Do you want to say anything, Mr. Moore?

5 MR. MOORE: Judge, the only thing I will say, because  
6 I've known Zach since he was a little boy, what has occurred in  
7 this case is completely out of character for him. And I've  
8 counseled with him and worked with him over the last year, and  
9 I can promise the Court that he is very remorseful and very  
10 contrite and ashamed, ashamed of what has occurred.

11 THE COURT: Okay. Anything the Government wishes to  
12 add?

13 MR. DAWSON: If it please the Court, consistent with  
14 the plea agreement that we executed sometime ago prior to the  
15 defendant's entering a plea to this particular charge, we  
16 agreed that we would recommend to the Court, based on all the  
17 facts and circumstances, that the defendant receive a probated  
18 sentence. We meant that then and we mean that now. And we  
19 submit that to the Court for its consideration.

20 THE COURT: All right. Well, as counsel and the  
21 Government both know, and as the Court pointed out at the plea,  
22 any pleas for leniency by the Government or anyone else are not  
23 binding on the Court. And the Court primarily is bound by the  
24 sentencing guidelines that are the law, regardless of what any  
25 individuals ask for.

DAILY COPY

6

1 Your case is a sad case, Mr. Scruggs, as your attorney  
2 eloquently stated. The primary actor in this case was your  
3 father. It would not have happened without him. And it makes  
4 it even sadder that you, his son, was brought into it.

5 The evidence in this case shows that you were fully aware  
6 of this corruption -- attempted corruption of Judge Lackey.  
7 You took that order that Balducci brought up to your law office  
8 that -- the corrupt order that was attempted to be bought from  
9 Judge Lackey. And you made comments on it. You said where  
10 commas should be and what things should be said about it, what  
11 the order should say.

12 And based on some of those tapes that you -- that were  
13 played at the request of your attorney -- or your father's  
14 attorney, Mr. Keker, and which I heard because they were  
15 produced, I just -- it was just clear that you not only knew  
16 what was going on, you were participating in what was going on.  
17 You helped write that order.

18 You shake your head, Mr. Moore; but I heard the tapes. He  
19 wrote -- he suggested what should be in that order, that  
20 corrupted order. Have you heard that?

21 MR. MOORE: Judge, I've listened to every tape,  
22 interviewed every witness.

23 THE COURT: Well, then, you've heard that if you've  
24 listened to every tape.

25 MR. MOORE: I did Judge --

Exhibit A

DAILY COPY

7

1           **THE COURT:**   He commented on it.

2           **MR. MOORE:**   -- and I hope I get a chance to respond.

3           **THE COURT:**   Well, you've had your chance to respond.

4 Well, you can respond to that; you can respond to that. Go  
5 ahead.

6           **MR. MOORE:**   Thank you, Your Honor.   Zach Scruggs  
7 never had any knowledge whatsoever that there was any  
8 conspiracy to bribe a judge in this case.   Zach Scruggs, on  
9 March 28th, was at a meeting about a --

10          **THE COURT:**   He's not being sentenced for conspiracy  
11 to bribe a judge.

12          **MR. MOORE:**   I understand, Judge.

13          **THE COURT:**   He's being sentenced for misprision of a  
14 felony.   But the underlying offense is the corruption of Judge  
15 Lackey.   He knew that Judge Lackey was being corrupted, and he  
16 had an order there that he was looking at that was part of --  
17 that was an order that was being bought from Judge Lackey -- or  
18 being taken -- persuaded -- at the very least, that he --  
19 you're saying he knew -- that I know he knew -- was that this  
20 order was the result of a corruption or attempted corruption of  
21 Judge Lackey.

22          **MR. MOORE:**   Right.   Your Honor, I --

23          **THE COURT:**   And whether it was for money or whatever  
24 else is really immaterial; it was a corrupt order.

25          **MR. MOORE:**   The only difference -- and I don't want

DAILY COPY

8

1 to offend the Court. But the only difference is, is that the  
2 only thing Zach knew was that Tim Balducci went to have a  
3 conversation with Judge Lackey. He never knew that anybody  
4 conspired to bribe a judge or to do something untoward.

5 The tape that you're talking about is a tape that occurred  
6 after Tim Balducci came to the Scruggs Law Firm on November the  
7 1st, wired up, wearing a wire, walked up the stairs, saying he  
8 was there to meet with two individuals, Sid Backstrom and Dick  
9 Scruggs.

10 Zach Scruggs, all the evidence would show, happened to  
11 walk in the room that day. He was never a part of that. And  
12 that's the only evidence the Government ever had in this case.  
13 And that may be a distinction without a difference in Your  
14 Honor's mind, but it's a distinction in Zach's mind.

15 THE COURT: Well, that's something you can argue.  
16 Whether or not that's true remains open. He hasn't pled guilty  
17 to being part of the bribery. And he's not being sentenced for  
18 part of the bribery.

19 You know, when Mr. Backstrom -- who's admitted he was part  
20 of the bribe -- and your client are as close as they were,  
21 they're up there in that office every day talking about  
22 their -- the legal projects of the firm -- and it's hard to --  
23 it's kind of a stretch of credulity to believe that Backstrom  
24 never mentioned that money was being sent down to Judge Lackey.  
25 You can claim that; you can argue that. And as far as the law

Exhibit A

DAILY COPY

9

1 is concerned, I'm going to base the sentence on that. But  
2 whether or not I believe that is something else.

3 MR. MOORE: One thing I'd say, Judge, is -- and I  
4 know you've listened to some of the tapes, but I've listened to  
5 all of them. And if the Government has a different view, they  
6 can say it. With all of the conversations, hundreds of  
7 conversations, that were wiretapped and taped, there's no  
8 mention of Zach Scruggs in this case anywhere. He just --

9 THE COURT: I understand all of that. That's not  
10 part of this hearing.

11 What do you say, Mr. Dawson?

12 MR. DAWSON: I'd have to disagree with that  
13 statement. Mr. Scruggs -- Zach Scruggs is mentioned on some of  
14 the tapes.

15 THE COURT: That was my recollection also. And  
16 another thing that impressed me negatively about this, frankly,  
17 is that when you, Mr. Scruggs, and Mr. Backstrom were talking  
18 with Mr. Balducci over this order that he had brought to you  
19 before it had been entered by Judge Lackey, it was an order  
20 that you were commenting on how it should read and what it  
21 should say -- and you've told me that you have a great respect  
22 and love for the legal field, for the legal profession. And  
23 I'm -- I'm not questioning that.

24 But you certainly had no great respect for the Circuit  
25 Court of Lafayette County or Judge Lackey, because the tapes

Exhibit A

DAILY COPY

10

1 show that you told Mr. Balducci and Mr. Backstrom that we need  
2 to hurry up and get this order signed before some other asshole  
3 gets the case. Now, that's a total thumb in your nose at the  
4 Lafayette County Circuit Court. And it contradicts your  
5 statement to the Court that you have a great love and respect  
6 for the legal profession.

7 Based on these considerations, and based on the sentencing  
8 guidelines that have been furnished the Court, you have no  
9 criminal history. I'm taking into consideration the  
10 Government's plea bargain with you. Of course, I told you when  
11 the plea bargain was entered into it was not a binding plea  
12 agreement.

13 If, really, the Government and defendants were serious on  
14 something that would bind the Court to a specific sentence, it  
15 would have been an 11(c)(1)(C) plea agreement like  
16 Mr. Backstrom had which bound the Court.

17 MR. MOORE: Your Honor, we were informed by the  
18 Government on that matter -- we asked for a binding plea and  
19 the Government --

20 THE COURT: You didn't get it. You were here when he  
21 entered a plea of guilty. It was not an 11(c)(1)(C); I told  
22 you it was not binding.

23 MR. MOORE: Judge, we know that. I just --

24 THE COURT: Well, all right. Then, if I want you to  
25 say anymore, Mr. Moore, I'll ask for it.

Exhibit A

1           **MR. MOORE:** Judge, I appreciate that. I thought a  
2 lawyer could always respond to the Court respectfully.

3           **THE COURT:** No, you do not. I didn't ask you to  
4 respond. I wasn't saying anything to you; I was saying it to  
5 your client.

6           **MR. MOORE:** I apologize if I've offended the Court in  
7 some way representing my client, Your Honor.

8           **THE COURT:** Well, you know, it's not -- I'm not going  
9 to argue with you about it, but there's no -- this was never an  
10 11(c)(1)(C) plea agreement.

11           **MR. MOORE:** The only response I hope your -- it's  
12 okay for me to respond now. The only response I have is we  
13 attempted to do a binding plea, and the Government informed us  
14 that this Court would not accept a binding plea on probation.  
15 And that's why we did not do it that way.

16           **THE COURT:** Okay. So it was not an 11(c)(1)(C).

17           **MR. MOORE:** That's right, Your Honor.

18           **THE COURT:** All right. Then we're in agreement on  
19 that. But as I was saying, I am giving some weight to the  
20 Government's recommendation for leniency. The guidelines are  
21 from 21 to 27 months. Pursuant to the Sentencing Reform Act of  
22 1984, it is the judgment of the Court that the defendant, David  
23 Zachary Scruggs, is hereby committed to the custody of the  
24 Bureau of Prisons to imprisoned for a term of 14 months on  
25 Count 1 of this charge.

DAILY COPY

12

1       Upon release from imprisonment, you'll be placed on  
2 supervised release for a term of one year. The defendant shall  
3 comply with strict mandatory conditions while he's on  
4 supervised release. I'm not going to go over all of those at  
5 this time. The probation officer will go over them with you at  
6 that time. But suffice it to say, Mr. Scruggs, if you violate  
7 any of them, it means that you'll be back up before the Court  
8 for additional service.

9       It's further ordered that -- the Court has gone below the  
10 guideline range on the imprisonment time. The Court is of the  
11 opinion that the Court should and does hereby depart above the  
12 guideline range to the statutory fine. And the Court has  
13 considered the need for the combined sentence to reflect the  
14 seriousness of the offense and to offset the cost of the  
15 Government for the imprisonment and supervision of the  
16 defendant, which is estimated at \$2,100 a month for  
17 imprisonment and \$1,700 a month for supervision after release.  
18 So the fine in this case will be \$250,000.

19       Now, do you want to report to the institution that's  
20 designated for your service on your own?

21       MR. GRAVES: Yes, Your Honor. We'd like to ask for a  
22 report and --

23       MR. MOORE: Judge, we'd respectfully ask the Court in  
24 this case -- I believe the August 4th date was set for the  
25 others. This is probably a bit extraordinary for the Court,

1 but Mr. Scruggs's wife is pregnant with their third child. The  
2 child is due in October. I wondered if the Court would show  
3 this defendant mercy enough to allow him to report after his  
4 child is born.

5 THE COURT: You may file a written motion to that  
6 effect, the Court will consider it.

7 MR. MOORE: We will, Your Honor. We'd ask -- an  
8 additional request would be -- the fine is \$250,000 -- that he  
9 be given 30 days to pay that fine.

10 THE COURT: That'll be granted.

11 MR. MOORE: Thank you.

12 THE COURT: All right. So that we'll have some  
13 record that -- Mr. Scruggs, that you want to report on your  
14 own -- Ms. Morris -- this will be a statement that you agree to  
15 do that and that you will -- and it will not be necessary for  
16 the marshals to take you.

17 (Parties complying.)

18 MR. MOORE: Judge, one other request that the other  
19 defendants had -- and we were not prepared to do that today --  
20 is that we have not given any consideration whatsoever to where  
21 Mr. Scruggs would go. And we know that is strictly up to the  
22 Bureau of Prisons, but we know that the Court's recommendation  
23 sometimes carries some weight. Could I include that in our  
24 motion on the time to report due to his wife's pregnancy?  
25 Could I include a recommendation for your consideration?

1           **THE COURT:** You may include a request for a specific  
2 institution.

3           **MR. MOORE:** Thank you, sir.

4           **THE COURT:** All right. If there's nothing else, you  
5 gentlemen may be excused.

6           **MR. GRAVES:** Thank you, Your Honor.

7           **MR. DAWSON:** Thank you, Your Honor.

8           **THE COURT:** All right. The Court's going to be in  
9 recess for 15 minutes.

10                           (THE HEARING ENDED AT 10:14 a.m.)

11                           C E R T I F I C A T I O N  
12

13           "I certify that the foregoing is a correct transcript from  
14 the record of proceedings in the above-entitled matter, July  
15 2nd, 2008."

16   /s/ Rita Davis Sisk

17   RITA DAVIS SISK, RPR, BCR, CSR #1626  
18   Official Court Reporter  
19  
20  
21  
22  
23  
24  
25

<p>1 UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF MISSISSIPPI</p> <p>2 UNITED STATES OF AMERICA Cause No. 3:07CR192</p> <p>3 Plaintiff Oxford, Mississippi 4 February 21, 2008 5 v. 9:30 a.m.</p> <p>6 RICHARD F. "DICKIE" SCRUGGS 7 DAVID ZACHARY SCRUGGS 8 SIDNEY A. BACKSTROM</p> <p>9 Defendants</p> <p>10 MOTION HEARING 11 BEFORE THE HONORABLE NEAL B. BIGGERS 12 U.S. SENIOR DISTRICT JUDGE</p> <p>13 APPEARANCES:</p> <p>14 For the Government: United States Attorney's Office Northern District of Mississippi BY: THOMAS W. DAWSON, ESQ. 15 BY: ROBERT H. NORMAN, ESQ. BY: DAVID A. SANDERS, ESQ. 900 Jefferson Avenue Oxford, Mississippi 38655-3608</p> <p>16 For the Defendant 17 Richard F. "Dickie" Scruggs: JOHN W. KEKER, ESQ. 18 BROOK DOOLEY, ESQ. JAN NIELSON LITTLE, ESQ. 19 TRAVIS LEBLANC, ESQ. WARREN BRAUNIG, ESQ. 20 Keker &amp; Van Nest, LLP 710 Sansome Street 21 San Francisco, California 94111-1704 22 23 24 25</p>	<p>1 (CALL TO ORDER OF THE COURT)</p> <p>2 THE COURT: All right. Gentlemen, yesterday, I think 3 we decided that we would start today with the motion to dismiss 4 Counts 2, 3, and 4. But since this 404(b) material is fresh on 5 all of our minds, we won't have to reiterate it to talk about 6 that motion. If you gentlemen are ready to go to the 404(b) 7 material, I prefer to do that. If you're not, we can go back 8 to the 2, 3, and 4.</p> <p>9 MR. KEKER: We're ready, Your Honor.</p> <p>10 MR. NORMAN: We are, Your Honor.</p> <p>11 THE COURT: Okay. Well, let's go to the 404(b), 12 Mr. Keker. Just one second. I saw Mr. Trapp stand up. You 13 were going to talk on the --</p> <p>14 MR. TRAPP: I just wanted to say good morning, Your 15 Honor. I'm so far down here I wasn't sure if you could see me.</p> <p>16 THE COURT: Barely. All right, Mr. Keker.</p> <p>17 MR. KEKER: Mr. Trapp's worried (inaudible). The 18 404(b) has two issues, as the Court well knows. I'm not going 19 to talk about the law very much on the first one. But the 20 first issue is whether or not the evidence is just there to 21 show character, bad character, or is there some intent, 22 motivation, opportunity, plan, scheme; is it relevant to one of 23 the enumerated issues of 404(b). 24 The second part of 404(b) is equally and maybe more 25 important; and that is, if you determine that there is some</p>
<p>1 For the Defendant David Zachary Scruggs: 2 TODD P. GRAVES, ESQ. NATHAN GARRETT, ESQ. 3 Graves, Bartle &amp; Marcus, LLC 1100 Main Street 4 Suite 2600 Kansas City, Missouri 64105 5 816-256-3173</p> <p>6 For the Defendant Sydney A. Backstrom: 7 FRANK W. TRAPP, ESQ. JAMES W. CRAIG, ESQ. 8 Phelps Dunbar 111 East Capitol Street, Suite 600 9 Post Office Box 23066 Jackson, Mississippi 39225-3066 10 601-352-2300 J. RHEA TANNEHILL, JR., ESQ. 11 Tannehill &amp; Carmean, PLLC 400 South Lamar Boulevard, Suite C 12 Post Office Box 1383 Oxford, Mississippi 38655 13 662-236-9996</p> <p>14 Court Reporter: Rita Davis Sisk 15 911 Jackson Avenue, Room 369 16 Oxford, Mississippi 38865 (662) 281-3027</p> <p>17 Proceedings recorded by mechanical stenography, transcript 18 produced by computer. 19 20 21 22 23 24 25</p>	<p>1 probative value, does that probative value substantially 2 outweigh the risks that are basically 403 risks, unfair 3 prejudice, confusion of the issues, causing to delay in the 4 trial.</p> <p>5 We believe that this evidence about Wilson v. Scruggs, 6 which is a case that was before a lot of judges from 1994 on, 7 but among them was Judge DeLaughter in Hinds County, meets 8 both -- does not meet either one of these tests. At most, it's 9 character evidence; and second, it's -- it would lead to a lot 10 of unfair prejudice, confusion of issues, and so on. And I 11 think you got a taste of this yesterday.</p> <p>12 I'm not about to talk to you about what the law in this 13 area is because you know it very well. You got a taste for 14 Balducci. Balducci says in response -- Mr. Balducci says in 15 response to a question from the prosecutor, how did you know 16 when you were there agreeing to bribe a judge that -- and you'd 17 never talked to Mr. Scruggs about bribing a judge, and you're 18 agreeing to bribe a judge, how did you know that the Scruggs -- 19 Scruggs would cover it for you, cover this money? He's paying 20 money to a judge.</p> <p>21 And Mr. Balducci, who was a witness -- I think you could 22 see he was somewhat motivated to help the prosecution -- says 23 "because he bribed another judge." You say, well, excuse me? 24 What other judge? Judge DeLaughter, he said, was bribed. How 25 was he bribed? Was he bribed with money? No, it wasn't money.</p>

<p>5</p> <p>1 But I believe -- he offered him a federal judgeship? No, he 2 didn't offer him a federal judgeship. He offered to try to get 3 him on a list for a federal judgeship. Well, okay. That's 4 very interesting.</p> <p>5 What was Judge DeLaughter suppose to do? Vague -- I mean, 6 I'm not sure what Judge DeLaughter was suppose to do. He 7 certainly -- and that case didn't involve money. Mr. Langston 8 has said, in front of all the lawyers here, in front of them, I 9 believe; over and over and over again, that he knows of no 10 money that ever went towards Judge DeLaughter.</p> <p>11 THE COURT: You say Mr. Langston?</p> <p>12 MR. KEKER: Mr. Langston is the person who --</p> <p>13 THE COURT: I know who he is, but I don't know where 14 he -- how do you know what he said to him?</p> <p>15 MR. KEKER: Here's how we know, because when he 16 entered his plea before Judge Mills, here's what happened: He 17 was representing Mr. Scruggs. Mr. Zach Scruggs' lawyer, 18 Mr. Farese, at some point while this case was pending, took 19 Mr. Langston, Mr. Scruggs' lawyer. So this is Mr. Zach 20 Scruggs's lawyer takes Dick Scruggs' lawyer into the Government 21 and they make a deal for Mr. Langston.</p> <p>22 And Mr. Langston gets -- and goes to Judge Mills, not to 23 you; and they make a -- they put a lid on it, and he is now 24 cleared for all crimes, known and unknown, according to his 25 plea agreement. And he is the witness -- and we have no idea</p>	<p>7</p> <p>1 rulings to Mr. Scruggs. And indeed, the summary judgment 2 motion in that case was denied. Other motions were denied. I 3 can show them to you if you want to. The case went to trial. 4 When the case went to trial, Judge DeLaughter had been trying 5 to get that case settled for a long time, as any decent judge 6 would have.</p> <p>7 And after the case was in trial, it finally did settle; 8 and this whole dispute between Mr. Wilson and the Scruggs firm 9 ended up with Mr. Wilson getting close to \$4 million as you 10 heard yesterday, not as much as he wanted but not a goose egg. 11 Every decision in that case -- and I challenge them to point to 12 one decision that -- that this doesn't fit -- was correct on 13 the law. You read those -- order after order after order, 14 they're right; they make sense.</p> <p>15 Judge DeLaughter did what was apparently an excellent job. 16 He made the decisions that any good judge would have made; it 17 was a contract case. The thing of value in that case, 18 Mr. Scruggs doesn't appoint judges. Senator Lott, Senator 19 Cochran don't appoint judges. No one knows of any 20 recommendation that Mr. Scruggs has ever made for a judgeship 21 that has been accepted as a recommendation from a senator. 22 These senators and Mr. Scruggs are from different 23 political wings. Judge DeLaughter, as I understand it, is a 24 democrat. So -- and again, it's the White House that appoints 25 judges, not the senators.</p>
<p>6</p> <p>1 what was motivating Mr. Langston --</p> <p>2 THE COURT: I think the plea agreement said related 3 and unrelated.</p> <p>4 MR. KEKER: Beg your pardon. Beg your pardon. 5 Related and unrelated. But all -- as I understand it, all 6 crimes. And we expect the Government to call -- and when they 7 gave us 404(b) notice, they said "good and sufficient notice is 8 for you to go read his allocution of the plea where Mr. Dawson 9 described what the offense was." And he said that the offense 10 was from December of 2006 until March of 2007 there was a 11 conspiracy to influence Judge DeLaughter by promising him to 12 recommend -- get him on a list or something for a federal 13 judgeship. And in return, they were going to get favorable 14 rulings.</p> <p>15 Now, there's a lot of things that are interesting about 16 that and a lot of things that I think you need to consider as 17 you go forward and think about whether or not this evidence is 18 going to make the trial of this indictment a fair one. First 19 of all, let's just start with Mr. Scruggs strongly denies any 20 kind of bribe or corruption in the Wilson v. Scruggs case, 21 doesn't know of any; and we believe that this minitrial would 22 show that there wasn't any.</p> <p>23 The issue of favorable rulings, we don't know what they're 24 talking about. There were some favorable rulings to 25 Mr. Scruggs, but most importantly, there were unfavorable</p>	<p>8</p> <p>1 And then, what judgeships are they talking about? There 2 were three during this period, and I think it's worth noting. 3 Judge Lee went senior in April. Judge Jordan, two weeks later, 4 was appointed to take his position. Judge Barbour went senior 5 in February of 2006. Judge Southwick was appointed in June, 6 before the trial of this Wilson v. Scruggs case.</p> <p>7 THE COURT: Southwick was to the circuit.</p> <p>8 MR. KEKER: Okay. Then I got that wrong. I thought 9 that Southwick -- Judge Barbour's position was filled by 10 somebody, and I've got it wrong. I'm not sure who it --</p> <p>11 THE COURT: I'm not sure it's ever been filled.</p> <p>12 MR. KEKER: Oh, I'd understood -- we've got some -- 13 he was announced as a circuit court judge. Is he the one that 14 replaced Judge Pickering when that didn't work out?</p> <p>15 THE COURT: Yes.</p> <p>16 MR. KEKER: I think that's right. So there was an 17 announcement in June that Southwick was taking Judge Barbour's 18 place in the district court and -- or at least was nominated 19 for that; and then, apparently, they changed and put him on the 20 Fifth Circuit.</p> <p>21 THE COURT: Well, Barbour's position, I think, is 22 still open, isn't it?</p> <p>23 MR. KEKER: And that's what Mr. LeBlanc was just 24 telling me. And then Judge Bramlette announced senior status 25 in March of that year and Judge Ozerden in September was</p>

<p style="text-align: right;">9</p> <p>1 appointed to that position. But -- so whatever the vacancies  2 were, they were all filled during the time that the Government  3 alleges this conspiracy happened. And this -- the notion of a  4 quid pro quo just sort of doesn't line up, doesn't make any  5 sense.</p> <p>6 The Judge Ozerden position, by the way, was always  7 designated -- or people, at least, understood that it was  8 probably going to go to a south Mississippi, south coast  9 person.</p> <p>10 If the issue is whether or not there's anything criminal  11 or wrong or even unusual about Mississippi lawyers or  12 California lawyers or any other state lawyers recommending to  13 people that they know a good judge for a federal judgeship,  14 whether or not they have cases pending before them, then we'll  15 have to try that issue.</p> <p>16 Because we know that some of the most -- I mean, one  17 particularly, highly, highly respected lawyer in Jackson was  18 recommending Judge DeLaughter to Senator Lott at the same time;  19 and this lawyer happened to have in his office many cases  20 before Judge DeLaughter. People who don't have cases before a  21 judge could look forward to having cases before a judge.  22 People who don't have cases now maybe had cases in the past and  23 so on. Recommending a good judge to the federal bench is not a  24 crime.</p> <p>25 So the point is, to get through this, to get the experts</p>	<p style="text-align: right;">11</p> <p>1 action, but he'd been in this case since at least 2004. The  2 case was in Federal Court in the Southern District of  3 Mississippi. Judge Lee stayed it so that state court action  4 could proceed for sort of an accounting action, and then there  5 was more to do in federal court. He'd been involved in it for  6 a long time. He wasn't a newcomer to the case.</p> <p>7 Another reason of unfairness which we don't -- we haven't  8 played out yet is that there's various privileges involved here  9 that may be invoked and may make it difficult for us to get all  10 the evidence that we need to counter whatever it is  11 Mr. Langston feels like saying.</p> <p>12 And I just raise -- I asked the Government if they would  13 accommodate us by getting witnesses that I believe were under  14 their control to the hearing. And they informed me -- and they  15 very graciously did that. Mr. Langston is available if you  16 want to hear from him. But I asked about Mr. Ed Peters, who is  17 the local formal D.A., local lawyer in Hinds County that was  18 hired.</p> <p>19 And, again, if it's a crime to hire -- if the charges that  20 they were worried about getting hometowned in Hinds County,  21 then that's true; they were worried about it. Judge  22 DeLaughter's former law clerk was on the other side, was -- had  23 good relations with Judge DeLaughter, was advising the lawyers,  24 Mr. Merkel and others, about how to litigate that side of the  25 case.</p>
<p style="text-align: right;">10</p> <p>1 to talk about what this case was about, how Judge DeLaughter  2 ruled, what happened when, what work the lawyers did, would  3 really swamp the case that the indictment is about and has  4 very, very little to do with it.</p> <p>5 It is unfair -- let me start out with, the most huge  6 unfairness here is for the defendant Zach Scruggs and Sid  7 Backstrom. It's my understanding that the Government doesn't  8 contend, at least hasn't so far, that the evidence is  9 admissible or relevant as to either of them.</p> <p>10 So this would be one of those deals where they would  11 suggest to you that we try the case for a week; we work very  12 hard to understand Wilson v. Scruggs; we talk about all these  13 orders; we call experts; and then your instruction to the jury  14 that they should just ignore this evidence when it comes to  15 considering the cases of Dick Scruggs' son and his partner,  16 Mr. Backstrom.</p> <p>17 I mean, it's just not going to work, Your Honor; and I  18 think a judge of your experience can evaluate that, obviously,  19 for yourself. It's unfair to Dick Scruggs. If the Government  20 wants to bring this case as a separate charge, I guess they  21 will do it. There's nothing anybody can do about that. But  22 the idea that Langston, who was the counsel of record in Wilson  23 v. Scruggs -- they say that he just popped on the scene in, I  24 think, January and filed an appearance, January of 2006.</p> <p>25 He was -- he filed an appearance in the Hinds County</p>	<p style="text-align: right;">12</p> <p>1 Mr. Scruggs side of the case, through Joey Langston, hired  2 Mr. Ed Peters, who was also both a friend, former boss,  3 professional colleague of Judge DeLaughter, had a lot of cases  4 before him. Still has a lot of cases before him I believe.  5 But that's what it was. I don't think that's -- certainly,  6 it's not a crime. It's not unusual. And it doesn't lead to  7 the charge here.</p> <p>8 So what we've learned when we asked for Ed Peters to come  9 here is that they informed us that his lawyer said he might  10 take the Fifth. I don't know. We'll still try. Judge  11 DeLaughter, I don't know what the situation is going to be  12 there.</p> <p>13 I do know that both Senators Lott and Cochran, who we  14 understand make these recommendations by consensus, not by one  15 person deciding things, have speech and debate clause with the  16 United States Constitution privileges, which they may or may  17 not assert; I just don't know. But they certainly are  18 important witnesses.</p> <p>19 This gives us about a month if you decide to let this in.  20 We've got to go out and get experts to study this file and come  21 in and testify about the fact that these were good, honest,  22 true, supported by law, fair, proper rulings. That's going to  23 take a lot of time.</p> <p>24 And then another unpleasant loose end is the one I already  25 mentioned. The idea that Mr. Zach Scruggs' lawyer thought that</p>

<p style="text-align: right;">13</p> <p>1 it was okay to take Mr. Dick Scruggs' lawyer into the  2 Government and insist that these are really separate matters;  3 therefore, he doesn't have a conflict, is something I suppose  4 we'd have to get into.  5 So -- I don't know what to say about -- I mean, I can  6 argue it more legally. But this really does sound like one of  7 those instances where a trial judge, using his discretion, has  8 to decide -- maybe to put it -- put it to the Government. I  9 mean, if the Government says that they want to prosecute  10 Mr. Dick Scruggs for this and call it a crime, then we ought to  11 do it all at once. We'll try that case. But it won't be with  12 Sid and Zach because they're not -- under 8(b), they couldn't  13 be joined to that case.  14 And I guess the basic question is, If the Government  15 thinks they have a case that they can prove beyond a reasonable  16 doubt; they went to the grand jury, they brought it back;  17 you've heard a lot about it, why shouldn't they just go ahead  18 and do that and not, basically, divert the jury into some other  19 direction?  20 I believe that if you're thinking about this it would be  21 very useful for you to hear from Mr. Langston, not for a long  22 time, but -- and from Mr. Peters, too, about what the contours  23 of this allegation are so that you can decide whether or not it  24 makes any sense to try them as 404(b) in this case. And we  25 would ask you to do that. We'd ask for a hearing where I can</p>	<p style="text-align: right;">15</p> <p>1 of evidence so that it would be well within your power, and in  2 this case would make a lot of sense, to have a Rule 104 of the  3 Federal Rules of Evidence hearing where a trial judge can  4 insist on a proffer, and the proffer can come in whatever form.  5 It can come from the Government; it can come from the  6 witness. But before Mr. Langston -- and I am not talking about  7 Jencks Act. Before he gets up and talks to a jury who's  8 supposed to be trying this case about Judge Lackey getting a  9 cash bribe in this case, that we all know about, and  10 Mr. Langston completely clutters it up with these allegations,  11 which are far afield and we don't believe have any probative  12 value, but to the extent that they -- that you think otherwise,  13 we're just off on a frolic and a detour and a whole other case.  14 And then afterwards you think, Gee -- and then we stand up  15 after Mr. Langston testifies and say, We need the Jencks Act  16 material, and we need a continuance, and we need all this stuff  17 to counter these allegations. We've got a real trial problem  18 on our hands, and we will try to avoid it. But one way to deal  19 with it is to put Mr. Langston up and make a good firm decision  20 now after you listen to him, that I don't want to get into this  21 in this trial.  22 If the Government thinks this is a crime, they have a way  23 to deal with it; they can bring a charge. If they just want to  24 kind of use it to clutter up this case, then we're not going to  25 let them do that. That's where we think you ought to come out.</p>
<p style="text-align: right;">14</p> <p>1 examine Mr. Langston about some of these matters for a little  2 while, whatever time limit you want to put on it.  3 THE COURT: All right. Now, you know, Mr. Kecker, the  4 Court's not going to give you a license to compete with Marco  5 Polo for a fishing expedition, as we got into yesterday almost.  6 And I'm not sure that 404(b) entitles you to anything more than  7 reasonable notice by the prosecution of what -- of the  8 substance, the gist, of what they intend to prove, if it's  9 allowed, in a 404(b)-type testimony.  10 So the fact -- there is law to the effect, previous  11 similar cases, that the -- that this notice requirement of  12 404(b) does not supersede the Jencks Act, which limits you to  13 your discovery, as you know. I'm not even sure you're entitled  14 to know what Mr. Langston is going to say until after he  15 testifies on direct.  16 Of course, they can give you the substance of what he says  17 if they're ordered to, you know, earlier than that, like  18 they've done on these other witnesses. But I want to hear what  19 the Government has to say about Mr. Langston being called to  20 testify in this case, in this hearing.  21 MR. KEKER: Could I respond just real briefly?  22 THE COURT: Yes.  23 MR. KEKER: The purpose of putting Mr. Langston on is  24 not some right -- what we're saying is there's -- I think I  25 said enough and you know enough about the dangers of this kind</p>	<p style="text-align: right;">16</p> <p>1 And then, as I said, they're about to argue their  2 severance motion. But it seems to me that they haven't over --  3 I mean, we can talk about limiting instructions to the jury all  4 we want. But those of us who have tried cases for a long time  5 know there are certain kinds of things that can't be overcome  6 by limiting instructions.  7 THE COURT: All right. As I understand the  8 Government's position at this point -- I'll like to hear what  9 they have to say about it -- they would contend -- I'm drawing  10 this conclusion from their brief that they filed in opposition  11 to your motion to disallow 404(b), that they intend to offer  12 this for the purpose of proving intent. That's as I understand  13 their position at this time.  14 Now, 404(b) also allows testimony of previous bad acts to  15 prove absence of mistake or misunderstanding, as you know.  16 Now, if Mr. Scruggs got on the stand and said, Well, this is a  17 mistake, I gave -- this is a mistake. Mr. Balducci and I  18 misunderstood each other. The money that I gave him -- I did  19 not understand it was to be for -- to bribe Judge Lackey. I  20 was giving it to him for some work he had done for me, and it  21 was all a mistake.  22 Now, would that 404(b) evidence of Mr. Langston also be  23 available to show the absence of a mistake, if that defense  24 were put on by you?  25 MR. KEKER: I think the Government would argue at</p>

<p style="text-align: right;">17</p> <p>1 that point something diff -- they wouldn't argue 404(b); they'd  2 argue impeachment. I mean -- or -- and they might to the  3 extent that they did, but that's not the situation that we  4 have. The situation that we have -- I mean, I can see  5 Mr. Scruggs testimony opening the door to various things that  6 otherwise might not be admissible in this trial.  7 But I can also see it not opening the door, and it's  8 not -- we don't know whether Mr. Scruggs is going to testify or  9 not. It depends on what the Government does. What we're  10 talking about now and what I'm moving to exclude is use in the  11 case in chief of this information as required by 404(b). And I  12 think that's a much different -- and really, I guess I should  13 make that clear.  14 We're not asking you to make a decision about what  15 evidence can come in on cross-examination. We may ask you to  16 make that decision during the trial or something before we put  17 Mr. Scruggs on but -- and try to get advanced rulings. But  18 we're not asking for that now. We're asking for, Should this  19 come in, in the Government's case in chief?  20 THE COURT: Okay. I understand. Mr. Norman.  21 MR. NORMAN: Good morning, Your Honor. We spent  22 yesterday hearing that Mr. Scruggs had no criminal intent. I  23 took that as the gist of the motion to dismiss yesterday, that  24 the Government had created some crime, that Mr. Scruggs had no  25 intention of violating the law. And now we stand before you</p>	<p style="text-align: right;">19</p> <p>1 Your Honor, in the Wilson case, Mr. Langston and  2 Mr. Balducci came into that case when it became clear that  3 Mr. Dunbar wasn't being as successful as Mr. Scruggs would  4 like. And Bobby DeLaughter, sitting on the bench, had a best  5 friend, a best friend in the world; he'd worked for as an  6 assistant DA, when he tried the cases that they've made movies  7 about. That boss, of course, as everybody knows, was Ed  8 Peters. And it was common knowledge that the two were tight.  9 The brief testimony of Joey Langston would be that they  10 hired Bobby DeLaughter. And at first, we heard they hired him  11 as a consultant --  12 THE COURT: You mean Ed Peters.  13 MR. NORMAN: Ed Peters, I'm sorry. No money went to  14 Bobby DeLaughter. They hired Ed Peters to be a consultant.  15 What struck me first was, That makes no sense. Ed Peters has  16 been a prosecutor, like me, for 30 years. Like me, he knows  17 nothing about civil litigation. Why pay him a million dollars  18 to bring him in to advise sophisticated civil lawyers on how to  19 try civil cases? That's absurd.  20 They brought him in -- as Joey Langston would testify,  21 they brought him in and paid him a million dollars, \$50,000  22 cash, followed by monthly payments making up a million dollars  23 to corruptly influence his best friend, Bobby DeLaughter. And  24 then, to be sure, they dangled a federal judgeship in front of  25 him.</p>
<p style="text-align: right;">18</p> <p>1 arguing the 404(b) that goes directly to that point.  2 Your Honor, I'd like to talk first about the Wilson case  3 and then talk about why I believe its relevance outweighs its  4 prejudicial value. Wilson is interesting in several respects.  5 First, what strikes me about this case, unlike most cases we  6 try in this courtroom, these aren't unsophisticated people.  7 These are extremely sophisticated lawyers at the top of their  8 game, at the top of their trade.  9 There was no effort to get Bobby DeLaughter to break the  10 law. There was no effort to get Bobby DeLaughter to rule in  11 violation of the law. That would have been foolish, and these  12 men are smart. What they wanted Bobby DeLaughter to do was  13 shade the law at every opportunity, to ensure a victory they  14 probably would have anyway. And that's an irony that's  15 interesting in both these cases, both in the matter involving  16 Judge Lackey and in the matter involving Mr. Wilson.  17 There is every reason to believe that the Scruggs Law Firm  18 probably would have prevailed in both those cases. The strange  19 part about this is that wasn't good enough. They had to have  20 an edge. And that resulted in efforts to corrupt judges free,  21 if possible, because these are businessmen. They know the  22 value of a dollar. Free, if possible.  23 But if it was necessary to pay, they were willing to do  24 that. Not only because of the \$30 million at stake, the \$26.5  25 million at stake, but also because of the status involved.</p>	<p style="text-align: right;">20</p> <p>1 Now, everybody in this courtroom knows Mr. Scruggs doesn't  2 have the ability himself to do that. But he has the  3 connections to the senator. Counsel opposite would argue that  4 the senator does not appoint judges. And everyone in this  5 courtroom knows that, best of all, Your Honor. But Your Honor  6 also knows how valuable it is to have a senator put you on the  7 list. And that's what happened.  8 And Joey Langston would say they made sure Bobby  9 DeLaughter knew they caused that to happen. And they did it in  10 the middle of trial when it was critical. Did Bobby DeLaughter  11 violate the law --  12 THE COURT: What do you mean they did it in the  13 middle of the trial?  14 MR. NORMAN: As the case was pending and approaching  15 its completion, after, I think, ten years of litigation -- this  16 happened in March when the case was settling -- going to trial  17 and then settling in the summer of 2006. As Joey Langston and  18 Tim Balducci took over the representation of the Scruggs Law  19 Firm, commencing some time, I think, in the fall of 2005 but  20 really getting hot in December 2006 and culminating in August  21 of 2006 when the matter settled.  22 By the time the matter got to trial, the judges' rulings  23 had whittled away at the plaintiffs case to the point where  24 Bobby DeLaughter said from the bench to counsel for both sides,  25 "I don't know why you want to try this case, nothing's left but</p>

<p style="text-align: right;">21</p> <p>1 bragging rights." And he was right.</p> <p>2 It is true that there was a judgment against the Scruggs</p> <p>3 Law Firm. But it's important to know it was a victory for them</p> <p>4 because they paid no new money. That's what they'd already</p> <p>5 paid Wilson. They, in effect, won on the merits.</p> <p>6 And they did that not by asking Bobby DeLaughter to</p> <p>7 actually break the law --</p> <p>8 THE COURT: I don't know. You still haven't</p> <p>9 explained my question. What do you mean in the middle of the</p> <p>10 trial?</p> <p>11 MR. NORMAN: In the middle of the pendency of the</p> <p>12 case, I should have said, Your Honor, not in the actual trial</p> <p>13 of the case, the pendency of the case. I'm sorry.</p> <p>14 Your Honor, the testimony would be brief from</p> <p>15 Mr. Balducci, about what you heard yesterday. The testimony at</p> <p>16 trial from Mr. Langston would be brief, about what you've heard</p> <p>17 from me this morning. That testimony would also implicate Zach</p> <p>18 Scruggs. Joey Langston is prepared to testify that Zach</p> <p>19 Scruggs was fully aware of what was going on in the Wilson</p> <p>20 case. It will not implicate Sid Backstrom.</p> <p>21 However, the Peterson case stands for the proposition that</p> <p>22 if 404(b) evidence is admissible against a defendant, then with</p> <p>23 a proper limiting instruction, it is admissible in the case in</p> <p>24 chief. Now, as we all know, this Court has complete discretion</p> <p>25 in this matter; and in the event the Court decides to allow</p>	<p style="text-align: right;">23</p> <p>1 the defendants, as far as expanding the length of the trial;</p> <p>2 and what would be the -- what would you have to prove in order</p> <p>3 to prove that this action, alleged action, by Mr. Scruggs was a</p> <p>4 similar crime? Would you have to prove the same elements that</p> <p>5 you have in this case, that you have to prove in this case? Or</p> <p>6 would it just be that Mr. Langston said it happened and that's</p> <p>7 it?</p> <p>8 MR. NORMAN: First, Your Honor, I think it's</p> <p>9 important to start by saying that the evidence of extrinsic</p> <p>10 acts doesn't have to be a crime at all. Simple bad acts are</p> <p>11 sufficient if they're relevant. However, in this case, it was</p> <p>12 a crime, and that's part of the similarity between the two</p> <p>13 offenses. The standard of proof that we must use, Beechum</p> <p>14 says, "This Court should determine, before admitting that</p> <p>15 evidence, that a reasonable jury could find on that evidence</p> <p>16 that the extrinsic acts actually occurred."</p> <p>17 THE COURT: All right. But would you have to prove,</p> <p>18 for example, the Title 18, 666, material that you have to prove</p> <p>19 in this case?</p> <p>20 MR. NORMAN: No, Your Honor. Because of the fact</p> <p>21 that all is required is bad acts. We believe that crime</p> <p>22 occurred, but we don't have to prove that. We have to prove</p> <p>23 that a bad act occurred that is relevant to something other</p> <p>24 than general character in this case.</p> <p>25 Now, counsel opposite also brought up privileges. I don't</p>
<p style="text-align: right;">22</p> <p>1 this evidence, it could be in the case in chief or it could be</p> <p>2 in rebuttal.</p> <p>3 I'd like to address that point very briefly, without</p> <p>4 citing a case from another circuit that I cited in my brief,</p> <p>5 because I don't think the Court will find that particularly</p> <p>6 persuasive.</p> <p>7 But as you know, Your Honor, the Beechum test is that,</p> <p>8 first, this extrinsic evidence must be relevant to a question</p> <p>9 that's critical to the trial of our case. And second, the</p> <p>10 probative value has to outweigh the prejudicial effect, where</p> <p>11 the intent involved in the extrinsic acts is the very same</p> <p>12 intent that's alleged and that must be proven by the Government</p> <p>13 in this case. The Beechum decision stands for the proposition.</p> <p>14 That, in and of itself, satisfies the relevancy prong of the</p> <p>15 Beechum test. Obviously, the Court still has to make that</p> <p>16 determination; and that's discretionary with the Court.</p> <p>17 Then the question is, Is it overly prejudicial? And the</p> <p>18 Beechum court suggested that we consider the similarity of</p> <p>19 these two, the extrinsic offense and the charged offense, in</p> <p>20 making the decision whether or not the probative value</p> <p>21 outweighs the prejudicial effect. What are the similarities?</p> <p>22 First, these two offenses both involved --</p> <p>23 THE COURT: Okay. I think -- I understand the</p> <p>24 similarities from what was said yesterday. But what is your</p> <p>25 position on the extent of discovery that would be available to</p>	<p style="text-align: right;">24</p> <p>1 know if the Court wants me to address that or not, but I'd like</p> <p>2 to. Because I'd like for the Court to know that when</p> <p>3 Mr. Farese brought Mr. Langston in to plead guilty to this</p> <p>4 offense of attempting to bribe a judge in the Southern</p> <p>5 District, attempting to corruptly influence that judge, he</p> <p>6 obtained written waivers from both, both Mr. Zach Scruggs and</p> <p>7 Mr. Langston, before doing that. And I've not seen them. I</p> <p>8 haven't asked to. I haven't cross-examined him, but I'm sure</p> <p>9 they're available if need be.</p> <p>10 Your Honor, as far as a privilege, any attorney/client</p> <p>11 privilege goes, as the Court well knows, if a lawyer and his</p> <p>12 client are involved in a crime together, there is no privilege.</p> <p>13 Now, we don't anticipate any executive privilege on the part of</p> <p>14 a senator. I don't believe you're going to see that as a</p> <p>15 problem. So I don't see that privilege will be an issue.</p> <p>16 What kind of notice are they required to have?</p> <p>17 THE COURT: Okay. You don't need to go into that.</p> <p>18 I've looked at that in your briefs. But who would you</p> <p>19 anticipate calling if this type material were allowed into</p> <p>20 evidence, what witnesses?</p> <p>21 MR. NORMAN: Your Honor, we'd already have Tim</p> <p>22 Balducci on the stand; and I would ask him, basically, what I</p> <p>23 asked him yesterday. That would probably be the first time</p> <p>24 this issue would be before the Court for your determination.</p> <p>25 Secondly, we would call Joey Langston. And his testimony, I</p>

<p style="text-align: right;">25</p> <p>1 believe I could -- the direct examination, I could do in five  2 minutes. We would call Senator Lott, and I believe his  3 testimony would be short, sir.</p> <p>4 THE COURT: All right. Thank you.</p> <p>5 MR. KEKER: Could I respond to some of that?</p> <p>6 THE COURT: Yes, you may.</p> <p>7 MR. KEKER: Let me start -- I think the goal posts  8 are moving a little bit here. They're not going to prove a  9 crime; they're going to prove a, quote, bad act. And I'm now  10 not sure what the bad act is. It's not bribing Judge  11 DeLaughter; it's not paying him to influence any opinion. It's  12 paying him to shade the law? What law was -- there was no law  13 shaded.</p> <p>14 They're going to prove that Ed Peters, who was a friend of  15 the judge and a former boss and a person who has many cases  16 before him and does a lot of work before him and is a person  17 that lots of lawyers in this state hire as local counsel when  18 they go down to Hinds County because he knows -- he's part of  19 the courthouse crowd, to balance Mr. Kirksey, the judge's  20 former law partner, who's there for the same reason  21 Mr. Merkel's got him.</p> <p>22 We are going to try that and try to explain to this jury  23 that, you know, that's not really -- that's kind of -- maybe  24 it's the way things are done. Maybe you like it; maybe you  25 don't like it. But it doesn't have anything to do, ladies and</p>	<p style="text-align: right;">27</p> <p>1 good judge.</p> <p>2 When you get into this file and find out what this case is  3 about, it was decided -- before Judge DeLaughter even got ahold  4 of it, it was decided that the contract between Mr. Scruggs and  5 Mr. Wilson was clear and unambiguous; and we're not going to  6 have parole evidence; and your rights depend on the word  7 existing and the word is.</p> <p>8 It's one of those trials about what does is mean? And  9 Judge DeLaughter wrote an opinion saying, "Is is what it is,  10 and existing means existing." And what he told these people  11 is, "I'm strictly construing the contract and that leads to  12 simply an accounting."</p> <p>13 And when the accounting was all done, it turned out that  14 the \$6 million that Mr. Scruggs had paid Mr. Wilson was enough,  15 so that Mr. Wilson wasn't owed more money. And at that point,  16 when Mr. Wilson figured that out and figured that he was --  17 that's what the bragging rights is about. But this case went  18 to trial, summary judgment was denied, a lot of money changed  19 hands in Mr. Wilson's favor. It was a fair and fully litigated  20 thing.</p> <p>21 Mr. Langston -- and I think we'll bring this out, and I  22 think Mr. Langston's got enough ego that he'll probably admit  23 this -- did a heck of a job. He took advantage of a foolish  24 effort by Mr. Wilson's lawyers to say to the judge, we want --  25 we want you to determine under this existing -- what is due</p>
<p style="text-align: right;">26</p> <p>1 gentlemen, with the charge that's before you.</p> <p>2 But we're going to spend a lot of time trying that because  3 what they're -- they aren't willing to say it's a crime.  4 They're not willing -- if they think it's a crime, then they  5 can carry out their professional responsibilities and deal with  6 it. They have grand jury power. But -- so, first of all, that  7 concerns me.</p> <p>8 And then second of all, the idea that they are going to  9 call Tim Balducci, who has some hearsay, and Joey Langston, who  10 has his deal and whatever he's going to say about this, and  11 that that's going to be the end of it; and that we're just  12 suppose to sit there and cross-examine them for five minutes  13 after they testify for five minutes, is not on any planet that  14 I'm knowledgeable about.</p> <p>15 We want to call -- they -- just in this presentation,  16 there's a lot of people who have been accused of a lot of  17 nastiness. And if nothing else, they ought to have the right  18 to come forward and say the way they see it. Mr. Peters, if we  19 can get him on the stand, we'll put him on the stand. Judge  20 DeLaughter, if we can get him on the stand, we'll put them on  21 the stand. Senators Lott and Cochran, we want them both.</p> <p>22 And then we want the lawyers in Jackson who have cases  23 pending before Judge DeLaughter, like Joey Langston, who are  24 recommending Judge DeLaughter as a federal judge because they  25 think he's a good judge. A lot of people think he's a very</p>	<p style="text-align: right;">28</p> <p>1 under the contract. And once that was determined, it turned  2 out that Mr. Scruggs had paid, by the \$6 million, enough money  3 to cover all of the claims that Mr. -- that Mr. Wilson had.</p> <p>4 So all of that is going to have to be litigated. And at  5 the end of it, the jury and, I think, you are going to be left  6 scratching your heads thinking, What has this got to do with,  7 and haven't we really gone way away from the things that the  8 jurors are sworn to do, which is make a decision about the  9 charges in this indictment.</p> <p>10 He says that this shows intent. I don't see the intent at  11 all the same. Mr. Balducci, at the behest of Judge Lackey,  12 said, Okay, I'll bribe you. And the question in that case is  13 whether or not Mr. -- I mean, various cases -- whether or not  14 Mr. Scruggs joined that conspiracy, and so on.</p> <p>15 But nobody contends that a bribe to Judge Lackey for an  16 order is some kind of -- I mean, is okay. It's clearly a  17 corrupt act. The jury is going to understand that. And the  18 question is, Who was responsible for it? And, so, whatever the  19 intent is in that case, they have to -- nobody's going to  20 wonder whether or not if you knowingly are making a cash bribe  21 to a judge you have that kind of intent.</p> <p>22 Over here, what they are going to have to do is figure  23 out, Is there anything wrong? And now we're getting -- is it a  24 bad act to hire Mr. Peters? And this million dollars, by the  25 way, Your Honor, this -- they've said in their proffer there</p>

<p style="text-align: right;">29</p> <p>1 was a reverse contingency fee. If you guys do better than X,  2 you get some money. And they did better than X, and they got  3 some money. It wasn't, up front, here's a million dollars to  4 go do something.  5 So I think, just this discussion, is kind of getting --  6 now they say -- before they didn't say; but now, I guess, they  7 say that Mr. Zach Scruggs -- I don't thoroughly understand.  8 But, clearly, Mr. Backstrom is not involved in this and -- is  9 not involved in these allegations. And the idea that he has to  10 sit through this is a big problem.  11 So this keeps moving. I mean, we now know -- here's what  12 you know, the similar act, it was not an effort to get Judge  13 DeLaughter to violate the law. It was not an effort -- it was  14 not involving any money to Judge DeLaughter or anything of  15 value, except that at some point -- oh, and you asked about  16 chronology. Let me make sure that this is straight because  17 we've gotten some discovery on this.  18 Senator Lott called Judge DeLaughter on about March 29th.  19 Said, I understand you're interested in a judgeship; why don't  20 you send me a resume. Turns out he already had resumes from  21 other people, that had sent him Judge DeLaughter's. This is  22 March 29th of 2006. Judge DeLaughter wrote him a letter and  23 sent it the next day. It's dated March 30th.  24 Two of the judgeships were gone very quickly, Judge --  25 well, at least one of them was. Judge Jordan was appointed</p>	<p style="text-align: right;">31</p> <p>1 Court is fully advised at this point of what the evidence is  2 that the Government wishes to introduce under 404(b), fully  3 apprised sufficiently to rule on this motion. I do not feel at  4 this time that there's -- that any testimony by any witness  5 would be productive or would add anything that's necessary to  6 be known to the Court before ruling on it.  7 The Court wants to take this motion under advisement and  8 read a couple of cases that have been presented to me in your  9 briefs again before ruling. And the Court will take this  10 motion of 404(b) under advisement and rule on it within a few  11 days.  12 All right. Who is going to represent the defendants on  13 the dismissal of Counts 2, 3, and 4?  14 MS. LITTLE: Your Honor, I will. I'm Jan Little from  15 Kecker &amp; Van Nest.  16 THE COURT: All right, Ms. Little.  17 MS. LITTLE: Thank you. Good morning, Your Honor.  18 THE COURT: Good morning.  19 MS. LITTLE: Counts 2, 3, and 4 charge the defendants  20 with violating 18 USC Section 666(a)(2), which criminalizes the  21 offer of a thing of value to an agent of a state or local  22 Government with an intent to influence him in connection with  23 any business or transactions of such Government agency provided  24 that the Government or agency receives over \$10,000 in federal  25 funding in a one-year period surrounding the charge.</p>
<p style="text-align: right;">30</p> <p>1 very soon after that. The trial in this case wasn't until  2 August. Summary judgment rulings, some of which went against  3 the Scruggs firm, were in July. So there -- it's not -- it  4 doesn't connect up. It's not like this case. It doesn't add  5 anything. And in fact, it detracts. We'll be spending a lot  6 of time dealing with something that has really nothing to do  7 with this indictment. If they can prove this indictment, let  8 them do it.  9 MR. NORMAN: Your Honor, excuse me. Counsel opposite  10 misstated one fact, unintentionally I know.  11 THE COURT: All right. You may rebut shortly.  12 MR. NORMAN: All I wanted to say to the Court is that  13 at one point counsel opposite said there was no money up front  14 to Ed Peters, and that isn't true. It is true that there was a  15 reverse contingency agreement; and because of that agreement, a  16 lot of this money went to Mr. Peters. But \$50,000 of -- amount  17 went to Mr. Peters up front in cash in a plain brown envelope  18 with the statement being made, "There's no 1099 on this."  19 MR. KEKER: And I don't think the evidence -- maybe  20 we can find out. Is there going to be any evidence that  21 Mr. Scruggs said, Pay Mr. Peters as a consultant without a 1099  22 or in cash; or was that something -- as I understand the  23 evidence, that's something that Mr. Peters -- I mean,  24 Mr. Balducci and Mr. Langston cooked up.  25 THE COURT: All right. Well, we'll see, maybe. The</p>	<p style="text-align: right;">32</p> <p>1 Now, the Government here claims that Judge Henry Lackey is  2 an agent of two entities, Lafayette County and the  3 Administrative Office of the Courts. There are three questions  4 that Your Honor must answer in evaluating our motion. First,  5 is Judge Lackey an agent of either Lafayette County or the  6 Administrative Office?  7 Second, if so, was the purported bribe made in connection  8 with any of the business of Lafayette County or the  9 Administrative Office? And third, if both of those things are  10 true, is it constitutional, under these facts, to apply the  11 statute to this conduct? And we respectfully submit that the  12 answer to each of these questions is no. This conduct cannot  13 be charged under Section 666.  14 First, we'll start with the agency question; and we'll  15 start with the statute. The Statute 666 defines an agent as a  16 person authorized to act on behalf of an organization or  17 Government; and they give the example of servant, employee,  18 officer, manager, or representative.  19 And then in the Fifth Circuit, the Phillips case -- I  20 think both sides agree that the Phillips case sets forth  21 various factors that are considered in applying this statute.  22 Your Honor, Judge Lackey of the Third Circuit Court of  23 Mississippi is not an agent of Lafayette County. Lafayette  24 County is one of eight counties in the third circuit, but he is  25 not an employee or officer of Lafayette County.</p>

<p style="text-align: right;">33</p> <p>1 We start with the Mississippi Constitution. Article I of  2 the Mississippi Constitution sets forth the three branches of  3 Government. Article V discusses the executive branch and  4 includes in Section 135 and 138 the county officers under the  5 executive branch, including sheriff, coroner, assessor, clerks  6 of court, members of the board of supervisors, but not judges.  7 THE COURT: If he's not an agent of the county or the  8 Administrative Office of the Courts, who is he an agent of?  9 MS. LITTLE: He's a member of the judicial branch.  10 It is a separate branch of Government.  11 THE COURT: Is he an agent of any governmental  12 institution?  13 MS. LITTLE: I suppose he'd be an agent of -- I mean,  14 he's an agent of the courts, of the Supreme Court. I mean, it  15 comes under the judicial branch, Article VI, which has the  16 judicial branch, as opposed to article V, which is the  17 executive branch.  18 THE COURT: I think the statute also says a manager,  19 doesn't it, an agent or a manager of a governmental unit?  20 MS. LITTLE: Yes. But Judge Lackey is not a manager  21 of Lafayette County either nor is he manager of the  22 administrative offices of the U.S. -- excuse me -- of the  23 courts. I say U.S. Courts; I'm thinking Your Honor certainly  24 wouldn't consider yourself a manager of the AO of the federal  25 judiciary.</p>	<p style="text-align: right;">35</p> <p>1 With respect to -- let me just talk for a minute about the  2 Administrative Office. I think the Mississippi Constitution  3 answers the question for Lafayette County. It's a separate  4 branch of Government, period. With respect to the  5 Administrative Office, we can look to the Mississippi Code,  6 Section 9-21-3 -- or excuse me -- dash 1, which is cited in our  7 brief, which says that the Administrative Office of the Court's  8 purpose is to administer the nonjudicial business of the  9 courts. That sort of answers it right there.  10 Judge Lackey is doing the judicial business and the  11 Administrative Office does the nonjudicial business. Judge  12 Lackey is not an agent of the Administrative Office. And  13 again, if you apply the Phillips' test, the Administrative  14 Office does not set the judge's duties; the Administrative  15 Office does not supervise the judges, does not pay the judges'  16 salaries. Those all come from the state; they do not come from  17 the Administrative Office of the Courts.  18 The second factor that Your Honor must consider is whether  19 this alleged bribe happened in connection with any of the  20 business of either Lafayette County or the Administrative  21 Office. And again, this is really -- it's tied to the agency  22 question. It's really, is there an action that's in the scope  23 of the agent's power?  24 And again, Judge Lackey does not conduct the business of  25 Lafayette County. He conducts the judicial business, but he</p>
<p style="text-align: right;">34</p> <p>1 THE COURT: No. Well, I don't know. But anyway --  2 sometimes I think they're the manager of us.  3 MS. LITTLE: I think Mr. Meacham thinks that, Your  4 Honor, but --  5 THE COURT: Yes. But he's gone now.  6 MS. LITTLE: Okay.  7 THE COURT: But, at any rate, does not a circuit  8 judge manage some of the moneys of the county?  9 MS. LITTLE: Your Honor, the legislature will  10 appropriate moneys that can be used for courthouse facilities and  11 the like. But that doesn't make Judge Lackey a manager of the  12 county any more than -- you know, Your Honor has to sign CJA  13 vouchers, for example. Those are moneys that are appropriated  14 by the U.S. Treasury. They're appropriated down.  15 You have to sign the vouchers for those moneys to be paid  16 for indigent defense, but that doesn't make you an agent of the  17 U.S. Treasury, nor does it make you an agent of the  18 Administrative Office. It's the three branches of Government  19 each have their roles. The legislature appoints the funds, and  20 they're used by the Courts as necessary.  21 This is in the Hosford case, and the Supreme Court of  22 Mississippi discusses this, how it's the legislature's  23 obligation to provide the funding that's necessary for the  24 courts to do their business. But that does not create an  25 agency relationship.</p>	<p style="text-align: right;">36</p> <p>1 doesn't operate funds or do any of the business of Lafayette  2 County. I mean, the business he conducts is settling disputes  3 between private litigants. And Lafayette County could even be  4 a litigant before Judge Lackey. But he does not conduct  5 Lafayette County's business.  6 THE COURT: Well, could a -- under your theory, could  7 a circuit judge ever be a party to a 666(e) charge?  8 MS. LITTLE: Yes, if there's some relationship to  9 some moneys involved. For example, the Castro case cited in  10 our brief talks about kickbacks to a judge in order to get  11 public defender appointment moneys paid. Or, for example,  12 there's the Massey and the Grubb case which involved judges  13 spending moneys for the hiring of detectives.  14 So when there's a bribe to a judge that somehow involves  15 the judge doing something involving moneys, then there can be a  16 666 violation. Here, the claim is that a bribe was paid to  17 influence a judge's ruling, has nothing to do with anything  18 with the public funds. It's simply to influence a ruling  19 between private parties.  20 And interestingly, the only cases where that kind of  21 conduct has happened -- they're out of circuit. But the Frega  22 case in San Diego -- this is a huge investigation in San Diego  23 involving 12 years' worth of corruption where plaintiffs'  24 lawyers were paying superior court judges to influence their  25 rulings in cases. And Judge Rafeedie in San Diego said that</p>

<p style="text-align: right;">37</p> <p>1 cannot be a 666 violation.</p> <p>2 Similarly, the McCormick case out of Massachusetts cited</p> <p>3 in our brief has to do with bribes to police officers in order</p> <p>4 to not investigate something. Again, the Court said, that</p> <p>5 can't be a 666 violation. Because it's not -- there's no</p> <p>6 involvement of the public funds there. It's simply paying a</p> <p>7 public official to influence their decision-making, but not to</p> <p>8 influence their involvement with public moneys, as was the case</p> <p>9 in Castro and Massey.</p> <p>10 So unless there's some kind of tie to the money -- that's</p> <p>11 the point of the Phillips case in Louisiana. There has to be</p> <p>12 some connection between the bribe and the money, some</p> <p>13 expenditure of public money, and that's not present here.</p> <p>14 Finally, Your Honor, on the constitutional point, in order</p> <p>15 for this conduct to be punishable and be constitutional, there</p> <p>16 has -- as I just mention, there has to be some connection to</p> <p>17 money being influenced. This 666 comes under the Necessary and</p> <p>18 Proper Clause of the Constitution, the spending power. There's</p> <p>19 got to be some nexus to money some how.</p> <p>20 Now, the Sabri case says you don't have to show a direct</p> <p>21 connection between the crime and specific federal dollars,</p> <p>22 because money is liquid and you don't have to tie it right to</p> <p>23 the federal dollars. But there's got to be some connection to</p> <p>24 some expenditure of money somewhere or else it's</p> <p>25 unconstitutional as applied.</p>	<p style="text-align: right;">39</p> <p>1 was the Southern District of California. As you said, Judge</p> <p>2 Rafeedie held that the federal bribery statute did not apply</p> <p>3 because there was no money.</p> <p>4 But, as you correctly cited later in one of your</p> <p>5 footnotes, that was before the Sabri v. U.S. which held that it</p> <p>6 was not necessary to have a nexus between the federal funds and</p> <p>7 the act charged.</p> <p>8 MS. LITTLE: That's right, Your Honor. But there</p> <p>9 still has to be a connection to some kind of funds. And if you</p> <p>10 look at the Sabri case, it talks about that. It says,</p> <p>11 Otherwise, you would just criminalize purely local acts; and</p> <p>12 that would upset the federal state balance that our</p> <p>13 Constitution holds so dear. There's got to be some kind of</p> <p>14 connection to some funds.</p> <p>15 Sabri talks -- first of all, Sabri is -- of course, it's a</p> <p>16 facial challenge. It's not a challenge to the law as applied.</p> <p>17 But what's important is in Sabri it talks about -- it says,</p> <p>18 "Congress has the power to keep a watchful eye on expenditures</p> <p>19 and to protect spending objects from the menace of local</p> <p>20 administrators on the take."</p> <p>21 So while Sabri says you don't have to show a direct link</p> <p>22 to the actual federal dollars, because, as Sabri points out,</p> <p>23 dollars are dollars, they are fungible, it's liquid. But you</p> <p>24 still have to have some connection to spending, to funding.</p> <p>25 Otherwise, you just have a purely local crime.</p>
<p style="text-align: right;">38</p> <p>1 So for these reasons, this conduct cannot be reached by</p> <p>2 666. And Your Honor asked exactly the right question, Can a</p> <p>3 judicial officer ever be charged? Yes, if the judicial officer</p> <p>4 is being bribed in order to do something to spend public</p> <p>5 moneys, like pay an indigent defense counsel, like pay for a</p> <p>6 private detective.</p> <p>7 But when a judge is being bribed to influence rulings</p> <p>8 between private parties -- the Frega case, the McCormick case</p> <p>9 say, no, that cannot be a 666 violation.</p> <p>10 THE COURT: All right. Well, are you familiar with</p> <p>11 the Fifth Circuit case that holds -- that if a judicial officer</p> <p>12 is merely corrupt and can be bribed, that that in itself</p> <p>13 threatens the integrity of the federal funds, that that</p> <p>14 judicial officer has some ability to control?</p> <p>15 MS. LITTLE: Is it the Lipscomb case?</p> <p>16 THE COURT: Even though there was no money involved</p> <p>17 in the act that he was bribed for, Fifth Circuit case?</p> <p>18 MS. LITTLE: No.</p> <p>19 THE COURT: Well, I don't have it. Let's see --</p> <p>20 MS. LITTLE: Is it maybe the Lipscomb case or the --</p> <p>21 I'm not sure which case you're talking about.</p> <p>22 THE COURT: Well, let's see. U.S. -- wait a minute.</p> <p>23 No, this is another case. Oh, well, you cited the case from</p> <p>24 San Diego; but that was, as you said in your brief -- correctly</p> <p>25 so -- in the Patrick Frega case, U.S. v. Patrick Frega -- which</p>	<p style="text-align: right;">40</p> <p>1 In the Fischer case, that's discussed. Otherwise, you're</p> <p>2 going to have a situation where purely local offenses, which</p> <p>3 are punishable by state law, end up coming into federal court</p> <p>4 where they don't belong.</p> <p>5 Mississippi has a state court -- a state bribery statute</p> <p>6 that could apply here. Just as in the Frega case, Judge</p> <p>7 Rafeedie noted that the California Penal Code, Section 93,</p> <p>8 which criminalizes bribery of local people. That does not --</p> <p>9 that's enough. The state's rights can punish that conduct if</p> <p>10 they want to, but that doesn't mean the case belongs in federal</p> <p>11 court.</p> <p>12 THE COURT: If this state statute was the one that</p> <p>13 was going to control, who would prosecute that?</p> <p>14 MS. LITTLE: That would be up to the state D.A.</p> <p>15 THE COURT: I know, I know. But I've read recently</p> <p>16 that the Attorney General said he wouldn't prosecute this case.</p> <p>17 MS. LITTLE: I think there's district attorneys,</p> <p>18 there's other folks, that could prosecute it.</p> <p>19 THE COURT: All right. No. I mean, just because one</p> <p>20 state institution says they would not take on the case doesn't</p> <p>21 mean that that would give this Court jurisdiction.</p> <p>22 MS. LITTLE: That's exactly right.</p> <p>23 THE COURT: I said that sort of facetiously. But the</p> <p>24 case -- the Fifth Circuit case that I had in mind when I asked</p> <p>25 you about it was U.S. v. Albert Lipscomb. Are you familiar</p>

<p style="text-align: right;">41</p> <p>1 with that case?</p> <p>2 MS. LITTLE: Yes. The Lipscomb case is -- frankly,</p> <p>3 I'm not quite sure what to do with it. It's a very long</p> <p>4 opinion, about a hundred pages. You have -- Judge Wiener,</p> <p>5 writes a very lengthy opinion on discussing the Phillips test</p> <p>6 and whatnot. Judge Duhé concurs in the result but not in that</p> <p>7 analysis, and then Judge Smith dissents. So I'm not even sure</p> <p>8 what precedential value the Lipscomb case has.</p> <p>9 It's very scholarly and interesting to read, but I'm not</p> <p>10 sure that it has -- because there's a concurring opinion that</p> <p>11 doesn't join in that particular analysis, I'm not sure how much</p> <p>12 value it has to us. Thank you.</p> <p>13 THE COURT: Okay. Thank you. Mr. Sanders?</p> <p>14 MR. SANDERS: Your Honor, I don't think the Lipscomb</p> <p>15 case has any value to the defense position in this case either.</p> <p>16 I want to respond -- I can respond to defense counsel's</p> <p>17 arguments in the same order she made them.</p> <p>18 First of all, I want to respond to her agency argument.</p> <p>19 The Government's position is that Judge Lackey was an agent of</p> <p>20 the Administrative Office of Courts and of Lafayette County.</p> <p>21 As defense counsel pointed out, the first place to look is the</p> <p>22 statute itself, subsection D(1) of 666 points out that the</p> <p>23 definition of an agent, for purposes of this statute, is</p> <p>24 whether he's a representative authorized to act on behalf of</p> <p>25 the agency at issue.</p>	<p style="text-align: right;">43</p> <p>1 Jolly pointed to in the Phillips case were, for instance,</p> <p>2 whether or not the principal had control over the agent.</p> <p>3 In this case, back to 9-1-36, as I pointed out in the</p> <p>4 response, judges -- circuit judges have to come up with a plan,</p> <p>5 a personnel plan; and they have to then submit that plan as to</p> <p>6 how they're going to be utilizing the funds of the</p> <p>7 Administrative Office.</p> <p>8 And pursuant to the statute, I cited the statute and</p> <p>9 quoted it, They then determine whether they'll accept that plan</p> <p>10 or not. They're certainly exercising authority over them when</p> <p>11 they decide whether or not they're going to allow him to</p> <p>12 utilize a particular plan.</p> <p>13 Another example, as I pointed out, is whether he can rent</p> <p>14 a particular property or not. If Judge Lackey wanted to rent</p> <p>15 his own building, for instance, then he's -- he must then</p> <p>16 provide an appraisal for the value of that property. And then</p> <p>17 it's up to the Administrative Office of Courts whether or not</p> <p>18 they're going to be willing -- they're willing to pay money for</p> <p>19 him to rent that particular property. It's just another</p> <p>20 example of them having control over him.</p> <p>21 Whether he has control over -- another question that comes</p> <p>22 out of the Phillips case, whether Judge Lackey has control over</p> <p>23 employees of the Administrative Office of Courts comes, again,</p> <p>24 right out of 9-1-36. The statute provides specifically that</p> <p>25 the employees working for him, the specific ones who are</p>
<p style="text-align: right;">42</p> <p>1 As to -- and just as an example, as to the Administrative</p> <p>2 Office of Courts, Mississippi's statute, 9-1-36 -- I think I've</p> <p>3 cited in my brief -- points out that certain funds come to the</p> <p>4 Administrative Office of Courts and those funds are then sent</p> <p>5 to the various circuit judges in the state.</p> <p>6 I think he receives \$40,000 per year for staffing. He</p> <p>7 receives \$4,000 a year for supplies. He receives \$4,000 for</p> <p>8 rent, as an example, if he wants to rent office space. And in</p> <p>9 fact, Judge Lackey does use that money as well. He certainly</p> <p>10 is authorized to act on behalf of the Administrative Office</p> <p>11 with that money. In fact, when he gets that money, he then</p> <p>12 goes out and hires his staff.</p> <p>13 It's up to Judge Lackey who he's going to hire as a law</p> <p>14 clerk, for instance, or a court administrator, Ms. Monette, for</p> <p>15 instance, Judge Lackey hires. He even is authorized to decide</p> <p>16 where he wants to rent property. He chooses the supplies.</p> <p>17 When they send him \$4,000 for supplies, they don't actually</p> <p>18 send him a \$4,000 check. He actually goes out and purchases</p> <p>19 everything he needs and then sends an invoice to the court. So</p> <p>20 certainly when he is out looking, he is authorized to act on</p> <p>21 behalf of the Administrative Office.</p> <p>22 Under the Phillips case -- and I'm not certain how much</p> <p>23 precedential value Phillips has left. Judge Jolly relied very</p> <p>24 heavily on principles that were abrogated by, I think, the</p> <p>25 Supreme Court in Sabri. But a few of the factors that Judge</p>	<p style="text-align: right;">44</p> <p>1 considered employees of the Administrative Office, are there at</p> <p>2 the will and pleasure of the circuit judges. So he certainly</p> <p>3 has control over his court administrator, for instance, who is</p> <p>4 seen as an employee of the Administrative Office.</p> <p>5 The Phillips case, as I know the Court is aware, was</p> <p>6 actually a case with a tax assessor out of the state of</p> <p>7 Louisiana and whether or not he was an agent of the Louisiana</p> <p>8 Parish. It's a case that is pretty fact specific as well. As</p> <p>9 this Court is aware, I'm sure -- and as every first year law</p> <p>10 student is aware -- when you learn in law school a rule of law</p> <p>11 and your textbook tells you that 49 states have followed that</p> <p>12 particular rule of law, you realize pretty quickly that that</p> <p>13 one state is almost always going to be Louisiana.</p> <p>14 So the tax administrator's position as is opposed to</p> <p>15 the -- as it relates to the parish doesn't have a great deal of</p> <p>16 value when we're looking at a circuit judge in the state of</p> <p>17 Mississippi.</p> <p>18 But one of the other points they look to is whether or not</p> <p>19 the parish paid the tax assessor's salary in Louisiana. They</p> <p>20 pointed out that the parish had nothing to do with his salary.</p> <p>21 In this case, we don't dispute that the state pays Judge</p> <p>22 Lackey's salary; but it's certainly administered and goes</p> <p>23 through the Administrative Office of Courts.</p> <p>24 As to Lafayette County, whether or not Judge Lackey is an</p> <p>25 agent of Lafayette County, again, we're looking to see whether</p>

<p style="text-align: right;">45</p> <p>1 he's authorized to act on behalf of the county. It almost goes  2 without saying that a circuit judge acts routinely on behalf of  3 Lafayette County. First and foremost, the orders he signs are  4 headed by "in the United States -- or "In the Circuit Court of  5 Lafayette County." I'm making the same mistake defense counsel  6 made.</p> <p>7 But as examples of him acting on behalf of Lafayette  8 County, when Judge Lackey is hearing cases at the courthouse  9 here on the square, he may be assessing fines to certain  10 parties, perhaps to an attorney who shows up late. All of  11 those fines go straight to the general fund of Lafayette  12 County, certainly acting on behalf of the county.</p> <p>13 He is the one who chooses who will be the county's victim  14 assistance coordinator, for instance. He selects the public  15 defender. As I pointed out in my response brief, just recently  16 in Lafayette County I think there were a number of supervisors  17 who wanted to change the public defender. I think it was  18 Mr. Ken Coghlan, who was involved in this case at one point.  19 And Judge Lackey wouldn't allow it. He was certainly acting on  20 behalf of the county.</p> <p>21 If the public defenders, for instance, have a conflict of  22 interest -- as I pointed out in my response -- it's Judge  23 Lackey who then, for the county, selects a private individual.  24 That private individual who represents an indigent defendant  25 would also submit to Judge Lackey his bill at the end of the</p>	<p style="text-align: right;">47</p> <p>1 are always aware that if they are unable to resolve conflicts  2 that the circuit courts are going to be there to help them  3 resolve these conflicts. If they want to then go into the  4 court, they're going to pay -- as I pointed out in my  5 response -- a fee. They're going to pay \$107. For instance,  6 Johnny Jones, in this case, paid \$107 to have the circuit court  7 provide a service, to have Judge Lackey hear the case, to have  8 a court administrator work the case.</p> <p>9 THE COURT: One thing I didn't understand about your  10 brief, you said that these fees to bring a case into court, to  11 file a case, you listed a hundred dollars or something for him  12 to file a civil case. And then you listed something like \$370  13 to file a criminal case. Who pays that in a criminal case?</p> <p>14 MR. SANDERS: Yes, sir, I believe the district  15 attorney's office pays that.</p> <p>16 THE COURT: Really?</p> <p>17 MR. SANDERS: I'm not certain of that. I just know  18 that to bring a criminal case in circuit court --</p> <p>19 THE COURT: You mean the district attorney's office  20 has to pay \$370 every time they file an indictment?</p> <p>21 MR. SANDERS: I'm not certain one way or the other.  22 I think there's a \$300 fee for every criminal case that is  23 brought, but I don't know who pays that.</p> <p>24 THE COURT: It's probably never collected. It'd  25 probably be by the defendant.</p>
<p style="text-align: right;">46</p> <p>1 day, and it's Judge Lackey who determines whether or not the  2 county is going to pay that much. I could go on.</p> <p>3 I mean, Judge Lackey is going to order the county to pay  4 any expenses, for instance, that that particular defense  5 counsel wants. If he wanted a psychiatric evaluation or if he  6 wanted a witness from across country. I know that different  7 attorneys oftentimes ask for that stuff, and the supervisors  8 wring their hands because the judge is ordering the county to  9 pay those kinds of things.</p> <p>10 Whether Judge Lackey has control over county employees, I  11 don't think there's anybody over in the courthouse who would  12 say that Judge Lackey doesn't have control over them, from the  13 circuit clerk all the way down to law clerks, court reporters,  14 anyone else who the Administrative Office and the county both  15 pay their salaries.</p> <p>16 Finally -- well, not finally. Secondly, as to whether or  17 not there is a connection with the bribe paid in this case and  18 a business transaction or series of transactions of the  19 Administrative Office or Lafayette County, as I pointed out in  20 my response, certainly cases being heard in circuit courts in  21 the state of Mississippi today are very real parts of the  22 business -- anyone who is in business, anyone who's practicing  23 law in the state now, circuit courts are a very real part of  24 their business.</p> <p>25 And any sort of contract dispute -- parties to contracts</p>	<p style="text-align: right;">48</p> <p>1 MR. SANDERS: It may well be.</p> <p>2 THE COURT: Taxed as court costs to the defendant.  3 But I don't think it's paid up front; when you file an  4 indictment, somebody has to pay \$370.</p> <p>5 MR. SANDERS: May not be. I may have gotten that  6 wrong. I do know though, however, in a civil case. As we're  7 talking about before us now, that the plaintiff does pay a \$107  8 fee when he files his complaint.</p> <p>9 Obviously, when he files that complaint, he is expecting a  10 service to be provided from Judge Lackey, from all the staff,  11 from the county employees, everyone working that case.  12 Portions of that \$107 fee go to pay employees of the  13 Administrative Office of Courts and go to pay salaries of the  14 county employees.</p> <p>15 Obviously, as well, the bribe paid to Judge Lackey was  16 certainly in connection with Judge Lackey's position as a  17 circuit judge. So I think clearly the bribe paid in that was  18 absolutely in connection with a business transaction of both  19 the Administrative Office and Lafayette County.</p> <p>20 Finally, their argument that this statute is  21 unconstitutional as applied to them in this case. The first  22 argument they make is that public money must be implicated.  23 That's not my interpretation of the Sabri decision. In fact,  24 the Sabri decision made it clear that there didn't have to be  25 any connection for jurisdiction purposes between the forbidden</p>

<p style="text-align: right;">49</p> <p>1 conduct and the federal funds.</p> <p>2 THE COURT: What were the facts in the Sabri</p> <p>3 decision?</p> <p>4 MR. SANDERS: In the Sabri decision, I do believe</p> <p>5 that Sabri was a developer in Minnesota; and he was bribing</p> <p>6 someone, I believe on a city council, something like that; so</p> <p>7 that he would then be able to avoid certain ordinances, certain</p> <p>8 zoning regulations, that kind of thing, I believe that was it.</p> <p>9 The Court, though, eventually ruled that --</p> <p>10 THE COURT: What about the Lipscomb case, the Fifth</p> <p>11 Circuit case that Ms. Little said she didn't have any --</p> <p>12 much -- didn't like?</p> <p>13 MR. SANDERS: Yes, sir.</p> <p>14 THE COURT: What are the facts of that?</p> <p>15 MR. SANDERS: Your Honor, I'm not familiar with the</p> <p>16 facts of the Lipscomb case, and I'm not because when I was</p> <p>17 doing the research and reading everything up to this case, I</p> <p>18 felt like Lipscomb -- the decision that Lipscomb made, as well</p> <p>19 as Moeller, I believe, those decisions were so completely</p> <p>20 abrogated by the Sabri case because they were -- they spent a</p> <p>21 great deal of time and effort discussing whether or not there</p> <p>22 had to be a connection to the federal funds. And when Sabri</p> <p>23 came in, they ruled there didn't have to be any connection</p> <p>24 whatsoever.</p> <p>25 I think that Lipscomb was made post Salinas. And Salinas</p>	<p style="text-align: right;">51</p> <p>1 MS. LITTLE: Your Honor, very briefly?</p> <p>2 THE COURT: Yes.</p> <p>3 MS. LITTLE: I'd like to respond to a couple of</p> <p>4 points. Mr. Sanders referred to the business of office space</p> <p>5 being provided -- or money for office being provided by the</p> <p>6 Administrative Office. In fact, my understanding is that -- at</p> <p>7 least for the office supplies and rent, the money does not come</p> <p>8 from the Administrative Office. It comes from the treasury --</p> <p>9 from the state treasury and is certified by the Supreme Court.</p> <p>10 But in any case, if you look at the Phillips case,</p> <p>11 footnote 13 talks about the fact that the parish there provides</p> <p>12 office space and the like; but that doesn't make Mr. Phillips,</p> <p>13 as the tax collector, an agent of the parish. And similarly,</p> <p>14 the Hosford case in the Mississippi Supreme Court talks about</p> <p>15 the fact that the legislature -- as part of, again, separation</p> <p>16 of powers, the legislature is required to appropriate funds in</p> <p>17 order for the judiciary to do its job, but that does not create</p> <p>18 an agency relationship.</p> <p>19 Briefly, on the Lipscomb case, Lipscomb involved a Dallas</p> <p>20 city counsel person, as I recall. But it did not involve a</p> <p>21 judge. And what I'm thinking about is essentially the</p> <p>22 Government hasn't cited a single case where a circuit court or</p> <p>23 a state court judge is prosecuted under Section 666 for being</p> <p>24 bribed for a ruling. That's what this case is about, and I'm</p> <p>25 not aware of any case where 666 has been applied in that</p>
<p style="text-align: right;">50</p> <p>1 had intimated that that was the case but hadn't come right out.</p> <p>2 They had put some language in the Salinas case that looked like</p> <p>3 there may still need to be some connection in some instance,</p> <p>4 and that's kind of what the Lipscomb case discussed. And then</p> <p>5 the Sabri decision came in next and made it clear that there</p> <p>6 didn't need to be any connection.</p> <p>7 Their position that there has to be a connection to at</p> <p>8 least some funds, then, Your Honor, is -- essentially, as I</p> <p>9 pointed out in my brief, their arguing -- logic would dictate</p> <p>10 that they must be arguing that, Well, then there has to be a</p> <p>11 connection to state or local funds. And that just -- that</p> <p>12 doesn't make sense in an argument that there's no federal</p> <p>13 jurisdiction.</p> <p>14 If the Court has said there doesn't have to be a</p> <p>15 connection to federal money, then certainly the Court didn't</p> <p>16 mean that there -- but there does have to be a connection to</p> <p>17 state or local money to confer jurisdiction on the federal</p> <p>18 courts. I don't think state or local money would have anything</p> <p>19 whatsoever to do with jurisdiction in Federal Court.</p> <p>20 And then, finally, they argued that the behavior in this</p> <p>21 case was just too attenuated to a federal interest in crime.</p> <p>22 And as I said in my brief, I think that's precisely what the</p> <p>23 defendants were arguing in Sabri, and that's precisely what the</p> <p>24 Supreme Court ruled did not have to be done.</p> <p>25 THE COURT: All right. Thank you.</p>	<p style="text-align: right;">52</p> <p>1 situation, the situation that we have before us.</p> <p>2 Finally, I just wanted to point out that, yes, there's got</p> <p>3 to be some kind of -- after Sabri, there still has to be some</p> <p>4 kind of connection to money. I don't mean to argue that it's</p> <p>5 only purely state and local money. There's got to be a pool of</p> <p>6 money where there are some federal funds flowing into it.</p> <p>7 That's what the Sabri case talks about. It talks about the</p> <p>8 liquidity of money. There has to be a pool of money, some of</p> <p>9 which is federal.</p> <p>10 The Sabri case points out that 666 was enacted to kind of</p> <p>11 fill some gaps in 641 and 201. 641 is theft of federal moneys</p> <p>12 and 201 is federal bribery. And what 666 was meant to do was</p> <p>13 fill some gaps there where you have, for example, theft of a</p> <p>14 pool of money, some of which is federal and some isn't. And</p> <p>15 666 is also meant to fill a gap in 201 where you have bribery</p> <p>16 of a state court official who has some connection to federal</p> <p>17 moneys, that's what 666 was intended to do.</p> <p>18 What Sabri says, is, okay, well you have these kind of</p> <p>19 mixed state and federal funding situations. You don't have to</p> <p>20 trace the crime right to those particular dollars and quarters</p> <p>21 and \$20 bills that are federal; you don't have to do that. But</p> <p>22 there still has got to be some connection to this pool of</p> <p>23 money, otherwise you can't get to the Necessary and Proper</p> <p>24 Clause of the Constitution. There's got to be some connection</p> <p>25 to money, and that's what Sabri says.</p>

<p style="text-align: right;">53</p> <p>1 Again, "Congress has the power to keep a watchful eye on 2 expenditures and protect spending objects from the menace of 3 local administrators on the take." Here, Judge Lackey was 4 allegedly bribed to issue a ruling between two private parties. 5 There's no expenditure of public moneys of any kind involved. 6 THE COURT: All right. Thank you. 7 All right. We will be in recess now for 15 minutes. 8 (AFTER A SHORT BREAK, THE PROCEEDING CONTINUED) 9 (CALL TO ORDER OF THE COURT) 10 THE COURT: All right. The Court is -- tell her to 11 come back in here, please. The Court is -- has considered the 12 arguments and the briefs filed by the attorneys on their motion 13 to dismiss Counts 2, 3, and 4, and finds that -- that the -- a 14 circuit judge does have duties that makes him or her an agent 15 or a manager of a county in which the circuit court sits and of 16 the Administrative Office of the Court in that the judge has 17 authority to hire certain employees, pay them from county 18 funds, or from AO funds. 19 He has the authority to buy supplies. He has the 20 authority to appoint public defenders, to levy fines whose 21 moneys go into the county treasury. And from which treasury, 22 he can expend certain funds for other purposes. He also has 23 the -- or she -- has the authority to appoint deputy court 24 clerks during term times of Court and set per diem rates for 25 those clerks and how many days they would be paid.</p>	<p style="text-align: right;">55</p> <p>1 corrupt act of the Government official. In that case, it was a 2 sheriff who allowed, for a fee, certain contact visits by the 3 girlfriends or wives of the federal prisoners who were kept in 4 the county jail temporarily. And the Fifth Circuit held in 5 that case that that was sufficient to violate -- to invoke 6 jurisdiction on -- under 666(e). 7 And they said specifically, Section 666(a)(1)(B) does not 8 require the Government to prove the bribe in question, had a 9 demonstrative -- demonstrated effect on federal funds. The 10 enactment's plain language is expansive and unqualified, both 11 as to the bribes forbidden and the entities covered, 12 demonstrating by its reference to quote any business or 13 transaction. And that is not confined to transactions 14 affecting federal funds. 15 So based on the liberal -- more liberal interpretation of 16 the Fifth Circuit Court of Appeals than the Ninth Circuit, the 17 Court is of the opinion that the motion to dismiss Counts 2, 3, 18 and 4 should be denied. And it will be so ordered. Of course, 19 the Court reserves the right to supplement this order, 20 delivered orally from the bench, at a later time. 21 All right. It's 11:25. We will be in recess now until 22 one o'clock and, at that time, take up -- start on the 23 remaining motions, which will be the two motions for severance 24 and the motion for a change of venue. I am not prejudging by 25 change of venue that -- well, change of venue is still on the</p>
<p style="text-align: right;">54</p> <p>1 And even though the order -- this order of the -- of Judge 2 Lackey in this case, which he was allegedly given money to 3 issue, did not affect any federal funds or any funds at all, 4 the Court has reviewed two cases that it believes is 5 controlling in this case. 6 The Fifth Circuit obviously gives a much more liberal 7 interpretation to Title 18, Section 666, than does the Ninth 8 Circuit in the cases that were cited by the attorney for the 9 defendant. The Ninth Circuit obviously has held that there 10 must be some affecting of federal -- of money by the issuing of 11 the order, if 666 is to apply. The Fifth Circuit has held the 12 opposite. 13 The Lipscomb case in the Fifth Circuit was -- had a 14 factual basis of a city councilman who was -- who had bribed 15 a -- or a city councilman who had been bribed by a taxi cab 16 company to issue certain votes and to -- in favor of the taxi 17 cab company, did not involve expenditure of funds and that was 18 held to incur jurisdiction. 19 That case said specifically that a corrupt or state 20 official who has real responsibility for, or often participates 21 in, the allocation of federal funds is a threat to the 22 integrity of those funds even if they are not actually directly 23 affected by his corruption. 24 Also in the Fifth Circuit, the Salinas case was a case 25 which did not involve the expenditure of any funds by the</p>	<p style="text-align: right;">56</p> <p>1 table, it's still in play, regardless of the Court's ruling on 2 the suppression of the wiretaps. 3 Because the suppression of wiretaps alone would not 4 dismiss this case. So change of venue is still relevant. And 5 we'll take those two motions up -- those three motions up at 6 one o'clock, starting with the two motions to sever; and then 7 the remaining motion will be the change of venue. We'll be in 8 recess until one o'clock. 9 (AFTER A LUNCH BREAK, THE PROCEEDING CONTINUED) 10 (CALL TO ORDER OF THE COURT) 11 THE COURT: We have two motions to sever. Which 12 motion do the defendants want to take up first, Mr. Backstrom 13 or Mr. Scruggs? 14 MR. GRAVES: Mr. Scruggs' motion, Your Honor. 15 THE COURT: Very well. 16 MR. GRAVES: Good afternoon, Your Honor. My name's 17 Todd Graves, along with -- Nathan Garrett's here at counsel 18 table with me. We represent Zachary Scruggs. The motion 19 before us is the motion to sever Mr. Zachary Scruggs from this 20 trial, and I want to basically go right to Rule 14. We've 21 briefed this pretty extensively, but the gravamen of Rule 14 is 22 prejudice; and that's what I want to focus on. 23 And in the Zafiro case in 1992 the U.S. Supreme Court 24 said, quote, there is a serious risk that a joint trial would 25 compromise a specific trial right of one of the defendants or</p>

<p style="text-align: right;">57</p> <p>1 prevent the jury from making a reliable judgment about guilt or  2 innocence.* They went on to say the defendants are tried  3 together in a complex case, and they have markedly different  4 degrees of culpability. This risk is heightened.</p> <p>5 And I think there's essentially three reasons why there's  6 a high risk of prejudice in this case. The first reason is  7 there's a huge distance in terms of the proof that the  8 Government's prepared to offer about Zachary Scruggs and about  9 the other defendants in this case. That's not to suggest that  10 I think the other proof will be sufficient to a jury; but  11 there's -- under any analysis, there's a huge spread.</p> <p>12 There are only, really, three thin threads that we wrote  13 about in our motion coming into this that connect Mr. Zach  14 Scruggs to this case, and those are only incriminating if you  15 already believe that he knew that there was a major afoot, if  16 there was a major afoot to bribe the judge and that he knew  17 about it. Otherwise, those three thin threads in and of  18 themselves are not incriminating.</p> <p>19 Something that Your Honor said earlier in response to -- I  20 think it was a motion for outrageous conduct, was that there  21 was ample evidence that there was more than passive conduct on  22 behalf of all the defendants. And respectfully, I would  23 disagree with that. I don't know that there is any evidence of  24 more than passive conduct on behalf of Zachary Scruggs, and I  25 think in that motion alone the outrageous conduct motion -- his</p>	<p style="text-align: right;">59</p> <p>1 related to this case; but especially if you haven't already  2 decided that he's a member of this conspiracy, it doesn't  3 connect him to this case.</p> <p>4 The third thread is the one we heard about yesterday that  5 said that Mr. Zach Scruggs may have been in the room when Tim  6 Balducci, who was only coming up into that office that day  7 because he was a Government agent and going up to incriminate  8 others based on the conduct he'd been caught with -- Zach  9 Scruggs allegedly was in a room for a small portion of the  10 conversation.</p> <p>11 There's no allegation -- you can listen to the tape. He  12 doesn't even say anything. This Government agent makes  13 statements that at best would be confusing to a person and, at  14 worst, would be gibberish. And Mr. Zach Scruggs says nothing.  15 And somehow, that is evidence that he has joined a conspiracy.</p> <p>16 And one of the things that I found interesting after we  17 were given the grand jury transcripts yesterday, even the  18 agent's description of what took place in that room when  19 Mr. Balducci went in the office and spoke to Sid Backstrom and  20 Zach Scruggs was in the room for a period of time -- the  21 Government's description of that to the grand jury is not  22 accurate.</p> <p>23 I'm not suggesting in any way that he went in and lied  24 about it. What I'm suggesting is it's such a fine point that  25 this has come down to about what was said on a particular day</p>
<p style="text-align: right;">58</p> <p>1 position is different than the other defendants.</p> <p>2 To say that his actions in this case, from what we've been  3 provided, is passive would overstate his involvement in this  4 case. The three threads we talked about, one of them was the  5 initial meeting. He was present at the initial meeting in  6 March when there was a discussion about attempting to influence  7 the judge in some manner, about the arbitration order.</p> <p>8 Well, the Government has conceded yesterday -- or my  9 understanding of what I heard was there is no allegation that  10 that meeting, in and of itself, was -- would support the  11 indictment. And, so, I think one of three threads that I came  12 to this hearing with doesn't even exist; so now we're down to  13 two threads that we have to deal with.</p> <p>14 The second thread is that Zachary Scruggs was in a  15 conference room when an order was delivered. And the  16 description of what took place when this order was delivered, I  17 think -- and again, I'm not perhaps -- perhaps I'm mistaken,  18 but I think it's the only place he's even mentioned in any of  19 the tapes in this case.</p> <p>20 He was sitting in a conference room behind the reception  21 station. The Scruggs Law Firm, the way it's laid out, there's  22 a little conference room with some books in there, right behind  23 that. He's sitting there working. Mr. Balducci comes up to  24 deliver an order and walks in and hands it to him. And I don't  25 see how that even connects him to this case. It was an order</p>	<p style="text-align: right;">60</p> <p>1 and that, therefore, Zach Scruggs belongs in this case; that  2 even the change of one word or two is pretty important. And  3 the phrasing of it and the description to the grand jury and  4 the tape, I think, are significantly different. Again --</p> <p>5 THE COURT: Would you be more specific on how it was  6 inaccurate?</p> <p>7 MR. GRAVES: Yes, I would, Your Honor. And I don't  8 have page numbers on these transcripts, so it's hard for me to  9 describe it. This is the grand jury transcript of 11-06 of  10 William Delaney. And toward the back of what I have -- again,  11 I don't have a page number. His description, quote,  12 Mr. Balducci to go back to Judge Lackey. This is a paraphrase  13 of Mr. Delaney of Mr. Balducci's -- what he said in that room  14 on that day.</p> <p>15 Mr. Balducci to go back to Judge Lackey on the first.  16 Quote, plus the fact that you still owe me \$10,000 from your  17 original agreement.* That's not in the tape. That's not what  18 was said. And that would be a pretty incriminating statement  19 if that was said.</p> <p>20 Second one -- I only have two, Your Honor -- the next  21 page. Quote -- paraphrased quote of Mr. Delaney paraphrasing  22 the statement of Mr. Balducci, what Mr. Balducci would say,  23 quote, you guys are paying for it, so you might as well get it  24 the way you like it. And they both agreed that it is fine as  25 it is.</p>

<p>61</p> <p>1 After Mr. Balducci talked with Zach Scruggs and Sid 2 Backstrom about this order and that they had paid for it and 3 get it like they wanted it, he did later have -- and it goes on 4 and that -- again, I'm not alleging that the agent purposely 5 misled the grand jury. What I'm alleging is it's a jumbling of 6 what actually happened. 7 And because it's such a fine pint and one thin thread that 8 his involvement in this case depends on, those changing of the 9 wording that "you paid for it, you still owe me 10,000," that's 10 pretty significant as to his position in this case. 11 Mr. Scruggs is not -- Mr. Zach Scruggs -- and it sounds 12 silly to say that, but that's the way we're going to have to 13 conduct this trial. But Mr. Zach Scruggs is not even mentioned 14 in the September 25th or the October 16th affidavit. When Tim 15 Balducci gives his preamble before he goes up to attempt to 16 incriminate members of this firm, he says, "I'm going up to 17 talk to Sid Backstrom and possibly to Dick Scruggs." 18 Mr. Zach Scruggs wasn't even mentioned in the preamble. I 19 think that the evidence will show, based on the evidence, that 20 I know anything about -- we can't even show -- the Government 21 can't even show that he was a willing participant in an 22 unlawful conspiracy. Yet I think it is also very possible that 23 he might be convicted solely on the basis of the weight of the 24 evidence against others, including his father. And I think 25 that goes to the heart of prejudice.</p>	<p>63</p> <p>1 the Government said, "In the Wilson case, the Scruggs Law Firm 2 was the defendant." 3 Well the Scruggs Law Firm wasn't the defendant in the 4 Wilson case. That was a different situation before the Scruggs 5 Law Firm existed. And if that would have gone horribly wrong 6 for Mr. Dick Scruggs' position in that case, it wouldn't have 7 cost Zach Scruggs a dime. So that is the kind of confusion 8 that I fear that we're going to have to deal with throughout 9 this case. 10 And even Mr. Kecker, who, through no intent but an intent 11 to try to describe who he's talking about and the difference in 12 these -- he said, when he was making one of his motions -- 13 arguments earlier referred to Zach Scruggs as Dick Scruggs' 14 son. And those are the sort of descriptive elements that I 15 think would lead to prejudice. 16 Yesterday, throughout the whole hearing -- and we tried to 17 keep track, and perhaps with a transcript -- which I haven't 18 been through -- I might be off by one. But I think only once 19 or twice throughout the whole hearing when Mr. Scruggs was 20 referred to was it made clear whether they were talking about 21 Mr. Dick Scruggs or Mr. Zach Scruggs. And again, that element 22 of confusion would lead to prejudice. 23 Based on this huge canyon of evidence, as I see it -- and 24 based on that, I don't see how a curative instruction could 25 bridge that canyon by telling the jury to put this out of their</p>
<p>62</p> <p>1 Let me step aside here very quickly. If the Court were 2 inclined to leave Mr. Zach Scruggs in this case, I think that 3 we are entitled to a James hearing based on the things I just 4 said. The standard of evidence is a preponderance that the 5 declarant and the defendant were members of the conspiracy, the 6 same conspiracy. 7 The statement was made during the course of the conspiracy 8 and was made in the furtherance of the conspiracy. And I think 9 that this is the unusual case where it is unclear whether they 10 could meet the standard by a preponderance, let alone by a 11 reasonable doubt, that Mr. Zach Scruggs was even a member of an 12 unlawful conspiracy. So that's the first thing. 13 The second thing is just the fact that his name is 14 Scruggs. Beyond the total distance of evidence between he and 15 the other defendants, his name is Scruggs. And Dick Scruggs' 16 name is obviously Scruggs. And as they said in the Auerbach 17 case, which admittedly wasn't a case about severance -- it was 18 a case about ineffective assistance at counsel because they 19 didn't get severance or didn't ask for severance. 20 Quote, the father/son relationship makes a motion for 21 severance far more compelling than in the usual case of 22 unrelated codefendants. That was from Auerbach, from the 23 Eighth Circuit in 1984. Something that came up earlier here 24 this morning that I think makes it even more compelling is, as 25 we were talking about the 404(b) evidence, one of counsel for</p>	<p>64</p> <p>1 mind and sort this out when we, as counsel, counsel for the 2 defense, the Court, the witnesses, can't seem to sort it out at 3 certain points. 4 The last thing I want to point out, not including the 5 distance in degree of evidence between the parties, the fact 6 that the Scruggs name is going to be very confusing. The 7 Scruggs Law Firm is called the Scruggs Law Firm. There's four 8 partners, there is not just three partners in the firm; there 9 are four partners in the firm. 10 Even beyond all that confusion, now we go into the 404(b) 11 evidence; and as I said a minute ago, that deals only with Dick 12 Scruggs for the purposes of this motion. And by assurances 13 that counsel has been given previously, that case, the 404(b) 14 case, there was no indication that Mr. Zach Scruggs was going 15 to be a subject or a target or had anything to do with that 16 case. That was my understanding. I believe that's going to be 17 the Government's position for the purpose of this motion. 18 This morning, that got clouded up a little bit; but I 19 don't think that's the Government's position this afternoon. 20 For purposes of this motion, he has nothing to do with that 21 case. The Scruggs Law Firm wasn't involved; and I think that, 22 again, it's not just distance, because that -- courts have said 23 that that's not always enough to grant a severance, distance, 24 father/son name and relationship. You throw in the 404(b) 25 evidence.</p>

<p style="text-align: right;">65</p> <p>1 I think that, in sum, what you start with is this huge  2 spread in the evidence. You pile on the 404(b) evidence  3 related to a wholly separate matter, having nothing to do with  4 Zach Scruggs; and you wrap all that evidence and the confusion  5 of the name, as it's recited here in the Court in the  6 father/son relationship; and what you have is a recipe for a  7 joint trial that will compromise the fundamental right and  8 prejudice the fundamental right of Zach Scruggs to be judged  9 fairly and impartially based on his conduct and his conduct  10 alone, his knowledge and his knowledge alone, and his intent  11 and his intent alone. And I think that calls for severance.  12 THE COURT: I heard something like you did this  13 morning -- I believe from Mr. Norman -- that perhaps Zach  14 Scruggs would also be a party to the 404(b). Did you hear  15 that?  16 MR. GRAVES: What was really interesting about that,  17 Your Honor, was it wasn't -- we've been led to believe that he  18 wasn't part of the 404(b). In fact, his previous counsel, as  19 part of the waiver of the conflict that we heard about, said  20 that the Government had assured him he wasn't a subject or a  21 target.  22 And then this morning, the very interesting nuance that I  23 heard wasn't, Zach Scruggs will be part of it; but there is  24 404(b) evidence against Dick Scruggs, and Sid Backstrom will  25 not be part of that evidence, not saying Zach will or won't be</p>	<p style="text-align: right;">67</p> <p>1 Your Honor, with respect to severance and joinder -- and I know  2 that the Court is thoroughly familiar with those issues --  3 there is no claim under Rule 8 of a misjoinder. As counsel  4 opposite said, they seek relief only under Rule 14, which is  5 the discretionary authority of the Court to grant a severance  6 in certain circumstances.  7 And those certain circumstances are that there can -- has  8 to be a showing of compelling prejudice against which the Court  9 is unable to afford protection. Severance has been held by the  10 cases that we have cited in our brief to be a drastic relief,  11 and movants have a heavy burden to demonstrate that without  12 such relief a fair trial cannot be obtained.  13 Just because there is a quantitative difference between  14 evidence in a multi-defendant case is not sufficient to warrant  15 severance. If that were the case, you could never have a  16 multi-defendant -- and certainly a multi-defendant conspiracy  17 case because just about in every one of those types of cases  18 the quantitative difference between the defendants is present.  19 However, in conspiracy cases, the evidence -- once a conspiracy  20 is established, the evidence is admissible against all the  21 co-conspirators.  22 Now, the Fifth Circuit has made it plain in joint trials,  23 especially in conspiracy cases, that severance is frowned upon.  24 And it's not favored at all. All evidence is admissible  25 against all co-conspirators. Now, there's a good reason for</p>
<p style="text-align: right;">66</p> <p>1 part of it. And that is exactly the kind of confusion we are  2 talking about, those sort of nuances.  3 THE COURT: In the notice, the 404(b) notice you got,  4 did they mention Zach Scruggs as being a party to that  5 evidence?  6 MR. GRAVES: The notice is not that detailed. It's  7 basically a letter saying to look at the previous pleadings and  8 the previous --  9 THE COURT: Okay.  10 MR. GRAVES: -- filings. But they did not mention --  11 one, they did not mention Zach Scruggs. Two, they  12 specifically, unless counsel was mistaken -- in the conflict  13 waiver letter that this defendant was given, they specifically  14 said he wasn't the subject or a target of that investigation.  15 And I can only go based on what previous counsel was told.  16 THE COURT: Okay. All right. Thank you.  17 MR. GRAVES: Thank you, Your Honor.  18 THE COURT: Does the Government wish to respond?  19 MR. DAWSON: Yes, sir. I didn't know whether the  20 Court wanted to -- since we responded to the severance in a  21 combined fashion, if you wanted to hear it individually or all  22 at once?  23 THE COURT: Well, I'd rather here it individually  24 since the reasons are different.  25 MR. DAWSON: All right, sir. Generally speaking,</p>	<p style="text-align: right;">68</p> <p>1 that, because you essentially have to try the same case twice  2 or three times because there is no significant advantage if all  3 evidence is admissible against all defendants.  4 Now, with respect to the allegations that were made by  5 counsel opposite, I think that he's certainly -- not  6 intentionally, but understated the evidence with respect to  7 Zach Scruggs. In November, the first transcript, which was  8 attached to the response -- I believe the response involving  9 outrageous Government conduct -- there is considerable  10 discussion between Balducci, Mr. Backstrom, and Zach Scruggs.  11 And I won't detail all of it; but Mr. Balducci says,  12 "Zach, let me bring you up to speed. All right. This is on  13 the Judge Lackey deal. Okay? You know I came by here last  14 week, and I gave you that order." And it goes on to  15 describe -- and the three of them have a discussion about the  16 order that was provided to Judge Lackey -- or Judge Lackey was  17 considering entering as a result of having been paid the  18 \$40,000.  19 Now, this is not just a normal conversation between  20 attorneys concerning a case about an order a judge has under  21 consideration. Mr. Balducci is not an attorney of record in  22 the Jones v. Scruggs case. He is not a party to it. He has no  23 interest in it. In fact, the Scruggs Law Firm has a very  24 reputable firm representing them at that time, the Daniel Coker  25 Horton law firm.</p>

69

1 It is clear to anyone in that conversation that something  
2 criminal is in -- afoot. Simply because, later on in the  
3 conversation with Backstrom and Zach Scruggs in the room, the  
4 statement is made, We need to get this right like we want it  
5 because we're paying for it. There is not one single  
6 objection. There's not one single, What do you mean, Tim  
7 Balducci? What have you done? What are you talking about? So  
8 it is clear that there's much more evidence just out of that  
9 conversation than the Court was led to believe.

10 Now, the other objection, I think, to a joint trial asking  
11 the Court for exercise of its discretion relates to the 404(b)  
12 evidence. Now, it is true that the 404(b) evidence is mainly  
13 against Dick Scruggs, one of the co-conspirators. However,  
14 between the time that this response was prepared and this  
15 hearing began, we became aware of some evidence that might  
16 indicate that Zach Scruggs had some knowledge of the back door  
17 attempt to influence Judge DeLaughter.

18 We've told counsel about that evidence, as Mr. Norman  
19 indicated today. But I also told counsel that -- for the  
20 purpose of this motion for severance, that we would assume for  
21 the sake of argument that both Zach Scruggs and Sid Backstrom  
22 were not implicated in the 404(b) evidence. And while I'm  
23 mentioning that 404(b) evidence, I think it is clear -- the  
24 Court should understand -- it is clear from the Government that  
25 this will be not the full-fledged trial of the Wilson case.

70

1 All the 404(b) evidence -- its purpose is to show the  
2 intent of the persons to whom the 404(b) evidence is admitted  
3 against. And that would be to show that they attempted to --  
4 and conspired to influence. It doesn't mean that we have to  
5 prove all the way down the line that Judge DeLaughter was in  
6 fact influenced or impugned by the evidence.

7 THE COURT: What did Joey Langston plead guilty to?

8 MR. DAWSON: I'm sorry?

9 THE COURT: What did Joey Langston plead guilty to?

10 MR. DAWSON: He pled guilty to the precise charge,  
11 that is, conspiracy to corruptly influence Judge DeLaughter.  
12 He pled guilty to a conspiracy charging himself, Richard F.  
13 "Dickie" Scruggs, and others. And the evidence to show it  
14 would be very brief in this sense.

15 THE COURT: Well, my question -- what I was asking  
16 about specifically, I heard Mr. Norman say today, he's not sure  
17 that that was a crime, that they committed a crime by that  
18 conspiracy; that he's not charging a crime.

19 MR. DAWSON: No, sir. I don't think that's what he  
20 said. I think what he said, or meant to say, was that it is  
21 not necessary to prove for 404(b) purposes that in fact it was  
22 a crime and the fact that Judge DeLaughter was in fact  
23 corruptly influenced.

24 THE COURT: He said something about, You don't have  
25 to show a crime; you just have to show bad acts.

71

1 MR. DAWSON: That is correct.

2 THE COURT: Which implies that that wasn't a crime.

3 MR. DAWSON: Yes, sir.

4 THE COURT: I wondered why Langston would plead  
5 guilty if it's not a crime.

6 MR. DAWSON: That's correct. The point is, in order  
7 to be guilty of a conspiracy to corruptly influence, that can  
8 be done between people who attempt to do that without going all  
9 the way down the line and proving that the judge was actually  
10 influenced corruptly. And that's what Joey Langston pled  
11 guilty to and is prepared to testify about, direct contact with  
12 Dickie Scruggs and others with respect to what they planned to  
13 do to adversely and corruptly influence the decision by Judge  
14 DeLaughter.

15 Once that conspiracy is formed and an overt act is done in  
16 furtherance of that conspiracy, it matters not whether or not  
17 Judge DeLaughter was ever actually influenced. And I think  
18 that's what the import of what Mr. Norman said was this  
19 morning.

20 THE COURT: Do you not have to go further and show  
21 that -- that they carried out some overt act in attempting to  
22 carry forward with that plan, to make that plan come into  
23 fruition?

24 MR. DAWSON: We will show that. We will absolutely  
25 show that, with clear evidence. However, if -- hypothetically

72

1 speaking, if what -- if all we had was just a discussion  
2 between Dickie Scruggs and Joey Langston about, Let's go  
3 influence the judge; and here's how we'll do it, we'll do X, Y,  
4 and Z, I think that would be a bad act in the sense of showing  
5 his intent with respect to this case. Now -- you see what I'm  
6 saying?

7 THE COURT: Is that all you're going to show in this  
8 case?

9 MR. DAWSON: No, that's not all we're going to show.  
10 I said if that's all you had that would be enough to show  
11 Dickie Scruggs' intent to corruptly influence the judicial  
12 process. But we're going to show more than that. We're going  
13 to show the actual conspiracy and an overt act in furtherance  
14 of the conspiracy.

15 So -- but the reason that we said, for the purpose of  
16 argument, that we would assume that both Backstrom and Zach  
17 Scruggs were not involved in the 404(b) evidence is because of  
18 the case of the United States v. Peterson in which the Fifth  
19 Circuit held that in a conspiracy case where 404(b) evidence  
20 was admissible against one co-conspirator but not admissible  
21 against the other two, that the Court's limiting instructions  
22 were sufficient to guard against any speculative prejudice or  
23 any actual prejudice that might have existed.

24 The -- it is clear, under Fifth Circuit law that we cited  
25 in our brief and in our response, that the mere fact -- and I

<p style="text-align: right;">73</p> <p>1 think Zafiro, the Supreme Court case, even alluded to this.</p> <p>2 The mere fact that you might make an argument that you have a</p> <p>3 better chance of being acquitted with a separate trial is not</p> <p>4 sufficient to warrant a severance. And in this case, we do not</p> <p>5 believe that a severance is appropriate.</p> <p>6 And moreover, if the Court were to deny severance, that</p> <p>7 doesn't mean the Court can't revisit that issue as the case</p> <p>8 develops. We don't think that that would change the Court's</p> <p>9 ruling. But if something would happen, unforeseen, that would</p> <p>10 cause a drastic prejudicial effect that the Court felt like</p> <p>11 that it could not protect the defendant, then you could always</p> <p>12 grant a severance at that time.</p> <p>13 It's not something we recommend. I just point out that --</p> <p>14 under Rule 14, that that is a continuing situation with respect</p> <p>15 to the granting or denying of severance.</p> <p>16 THE COURT: All right. Now, Mr. Dawson, under your</p> <p>17 duty to give notice to the defendants under 404(b), what do you</p> <p>18 plan on doing? What's the Government's position as to how much</p> <p>19 detail you must go into in telling them what the synopsis of</p> <p>20 the evidence is you plan on presenting? I've heard Mr. Norman</p> <p>21 say three witnesses you anticipate calling. But I'm still not</p> <p>22 clear on --</p> <p>23 MR. DAWSON: What the adequate notice is?</p> <p>24 THE COURT: Well, and I'm not clear on -- yes. And</p> <p>25 if you don't think you should tell -- should state at this time</p>	<p style="text-align: right;">75</p> <p>1 THE COURT: All right.</p> <p>2 MR. DAWSON: Now, if the Court has any additional</p> <p>3 questions with respect to the severance concerning Zach</p> <p>4 Scruggs -- I think at one point he did make that -- or one</p> <p>5 issue that he raised that I have not addressed -- and that is</p> <p>6 the pretrial publicity as a basis for a severance.</p> <p>7 I'm not sure I quite understand that because whether you</p> <p>8 try them separately or together, his name is still going to be</p> <p>9 Zach Scruggs; and he's still going to have -- work for the</p> <p>10 Scruggs Law Firm. I don't know how you change that. So I</p> <p>11 don't think that -- that that ground as urged -- it seems to me</p> <p>12 to be a nonsegregate in an argument. And if the Court has any</p> <p>13 other questions?</p> <p>14 THE COURT: No, not at this time.</p> <p>15 MR. DAWSON: Thank you, sir.</p> <p>16 THE COURT: Mr. Graves?</p> <p>17 MR. GRAVES: A couple of points if I may. I find it</p> <p>18 very ironic that in the very motion to sever Zach Scruggs from</p> <p>19 this case because of the inability -- one of our points is that</p> <p>20 the jury, no matter what the curative instruction is, is not</p> <p>21 going to be able to set aside what's before them. In the very</p> <p>22 motion of that, when the Government concedes, it's not arguing</p> <p>23 that 404(b) be included.</p> <p>24 Most of the discussion and the argument is about the</p> <p>25 404(b) evidence against Mr. Dick Scruggs. The fact is, if you</p>
<p style="text-align: right;">74</p> <p>1 what all the evidence is you plan on presenting -- I heard</p> <p>2 Mr. Norman say something about he doesn't -- he's not sure that</p> <p>3 somebody committed a crime in the Wilson case. And they don't</p> <p>4 have to charge -- they may not charge anybody because they're</p> <p>5 not sure it was a crime. Who is it that you're not sure</p> <p>6 committed the crime, I guess?</p> <p>7 MR. DAWSON: Well, just for the sake of argument, you</p> <p>8 could argue that Judge DeLaughter made a decision that could be</p> <p>9 upheld, and that he -- there was a lack of evidence to show</p> <p>10 beyond a reasonable doubt that he actually was influenced in</p> <p>11 his decision. That does not mean that Dickie Scruggs, Joey</p> <p>12 Langston, and others didn't conspire to corruptly influence</p> <p>13 him. I think -- in fact, that's what Mr. Langston has pled</p> <p>14 guilty to.</p> <p>15 THE COURT: So this -- I think Mr. Norman mentioned</p> <p>16 this morning that when Judge DeLaughter took a proposed order</p> <p>17 and showed it to Peters and Balducci and Langston, said, Is</p> <p>18 this okay with you -- basically what you're charging happened</p> <p>19 in this case with Judge Lackey. Are you saying that that's not</p> <p>20 sufficient to show --</p> <p>21 MR. DAWSON: No, sir, I'm not. I will say to the</p> <p>22 Court that that case is under active investigation. It is</p> <p>23 under active investigation. It is under active investigation</p> <p>24 by the Public Integrity Section of the United States Department</p> <p>25 of Justice in Washington, D.C. even as we speak.</p>	<p style="text-align: right;">76</p> <p>1 look at everything they provided us -- again, I'm working off</p> <p>2 memory -- I don't think that Zach Scruggs' name is mentioned</p> <p>3 anywhere in those.</p> <p>4 And this goes to the point, one of things I just heard,</p> <p>5 quote, some evidence that might indicate some knowledge. And</p> <p>6 we're talking about a person being tried under the United</p> <p>7 States Constitution based on his knowledge, his intent; and the</p> <p>8 prejudice here, I think, is clear.</p> <p>9 Fairness and prejudice is the standard that the Court gets</p> <p>10 to decide. I'm not suggesting that the Fifth Circuit has</p> <p>11 demanded that you make a particular decision in this case. But</p> <p>12 I certainly think that this is beyond the normal case. This</p> <p>13 isn't two drug dealers, and one we've got a little more</p> <p>14 evidence against him than we've got against the other.</p> <p>15 This is the case where the distance between what is going</p> <p>16 to be available, going back to the Wilson case, going through</p> <p>17 all the evidence in this case, is enormous. And not only is</p> <p>18 that distance the name is the same, you know, his father is on</p> <p>19 trial; and the confusion between the 404(b) evidence, the name,</p> <p>20 and everything. I think is a very real --</p> <p>21 THE COURT: Well, Mr. Graves, do you consider now</p> <p>22 that you have all of the evidence that they're going to</p> <p>23 present? Do you have it in your -- you have knowledge of all</p> <p>24 their evidence at this point?</p> <p>25 MR. GRAVES: Well, Your Honor, obviously, I don't</p>

<p style="text-align: right;">77</p> <p>1 have all the Jencks evidence and everything in every matter.  2 But I believe that the Government in good faith would  3 acknowledge there may be some other things here or there, but  4 that is basically what his involvement in this case comes down  5 to.  6 And I think it really comes down to that November 1st  7 tape. And that's something that was just spoken about a minute  8 ago. And the thing -- again, if you're viewing this from the  9 lens of -- if you know that there's a conspiracy and somebody  10 starts talking about sweet potatoes, that might mean something  11 for you. If you're in a room and someone comes in and delivers  12 a message, you've got things on your mind, this sweet potatoes  13 thing, and even if you heard it, it's a pretty odd thing.  14 If there was a true conspiracy and everyone was in on it,  15 it'd be like -- it would be like Agent Delaney's testimony was.  16 You still owe me ten grand; I owe the judge some money. Let's  17 get this thing right and get this over with. It wouldn't be, I  18 got to haul a load of sweet potatoes and this other gibberish.  19 From that moment on, you never hear Zach Scruggs' voice  20 again. There's no discussion. I don't know that the  21 Government can show he was in the room then. But whether he  22 was or he wasn't, he clearly wasn't in the room after that  23 point. And I don't know that that shows any intent to join a  24 conspiracy.  25 And this other issue of perhaps they were earwigging the</p>	<p style="text-align: right;">79</p> <p>1 Mr. Richard Scruggs, Your Honor.  2 THE COURT: Well, Mr. Graves, what were you asking?  3 MR. GRAVES: Your Honor, we're asking for a severance  4 from this case and --  5 THE COURT: You want a severance also from Backstrom?  6 MR. GRAVES: That would be our position, Your Honor.  7 THE COURT: Okay. Now, Mr. Trapp, you're only asking  8 for a severance from Richard Scruggs?  9 MR. TRAPP: That's correct, Your Honor.  10 THE COURT: Not from Zach Scruggs?  11 MR. TRAPP: That's correct. Your Honor, the case  12 against Mr. Backstrom boils down to essentially four tapes,  13 those are October 18, 31, November 1, November 13. The  14 credibility of Mr. Balducci -- I don't even believe the  15 Government would call Mr. Patterson after the Court grants the  16 severance, and we were tried separate.  17 And at trial against Mr. Backstrom -- and if the Court  18 included Zach Scruggs, Mr. Scruggs would be relatively short,  19 right at a week, I believe, Your Honor. The only tape that  20 they have referred to that they would want to use against  21 Mr. Backstrom that has anything relating to Mr. Richard Scruggs  22 is a November 1st tape, and that is easily separated because  23 Balducci has the conversation that the Court has heard about  24 where neither -- what they didn't tell you is, I think, and  25 to -- Mr. Zach Scruggs is leaving the office, which is</p>
<p style="text-align: right;">78</p> <p>1 judge, perhaps they were doing things that were improper under  2 a bar standard, that's very different than a criminal standard.  3 That's a very different matter. And I don't know that proof  4 that someone understands that an individual is earwigging a  5 judge -- if that's the case, there are a few other law firms  6 here in town that would suffer under that standard.  7 THE COURT: Well, no, certainly earwigging a judge is  8 not criminal, even though it's highly improper, but I don't  9 think that's an issue. All right. Thank you.  10 MR. GRAVES: Thank you, Your Honor.  11 THE COURT: All right. Mr. Trapp, are you going to  12 speak for your client, Mr. Backstrom?  13 MR. TRAPP: Yes, Your Honor. Your Honor, I'd like to  14 move directly to what I believe are the three areas that  15 warrant Mr. Backstrom from being tried with Mr. Richard  16 Scruggs, the senior partner, and the person who is identified  17 with the Scruggs Law Firm.  18 First, there is a disparity in the amount of evidence as  19 it relates to Mr. Backstrom versus the evidence that relates to  20 Mr. Scruggs in this case. Essentially, Your Honor --  21 THE COURT: Now, let me ask -- are you asking -- and  22 Mr. Graves too, as I understand your motions. You're not  23 asking just for severance from Mr. Richard Scruggs; you're  24 asking for a severance from each other also, from Backstrom --  25 MR. TRAPP: I'm just asking for a severance from</p>	<p style="text-align: right;">80</p> <p>1 reflected.  2 And Mr. Backstrom having had a -- is reading from this  3 order that they presented to him, and then had some  4 conversation about the order -- they don't do anything with the  5 proposed order from Judge Lackey. But he's reading into the  6 record -- on the tape and reading an order actually aloud as  7 this sweet potato.  8 And actually, the way he says it, Your Honor -- of course,  9 you remember I love this sweet potato because sweet potato  10 sometimes means Vardaman sweet potato or some variety of it.  11 Sometimes it means order; sometimes it means money. So it just  12 goes to show sweet potatoes have more uses than we've thought  13 of here.  14 Your Honor, the real -- if that was the only reason I  15 could offer the Court for a severance, I believe the Court  16 would be quick to deny it. But it's not the only reason. And  17 the primary reason that we are seeking a severance is 404(b)  18 evidence. And in the Supreme Court decision which dealt with  19 whether or not antagonistic defenses -- and we are not  20 asserting antagonistic defenses.  21 In that case, that's the Zafiro, if I am saying it right,  22 Your Honor, Z-a-f-i-r-o, Zafiro case, the Supreme Court itself  23 notices or specifically observed that there is a serious risk  24 when there's a joint trial that could compromise or prevent a  25 jury from making a reliable judgment. And I'm paraphrasing.</p>